April 27, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am likely not your typical applicant. I am a 34-year-old, first generation college graduate and second-generation high school graduate. After starting college at Jackson State Community College, I have taken courses at Harvard and earned advanced degrees in business, science, and law from the University of Tennessee, Columbia, and Vanderbilt. I have hands-on business experience with my family's third-generation pest control company, but I began working there crawling under houses to spray for termites, jack up floors, and pull out insulation. With my humble background, I can easily identify and empathize with people of all educational and socioeconomic backgrounds. I am a 2016 graduate of Vanderbilt University Law School and am writing to apply for a clerkship in your chambers.

First, my summer with a Tennessee DA's Office showed me the complexities of a six-defendant kidnapping, rape, and murder case without a body while contemplating the death penalty, and it helped me to understand how courts must balance the rights of the accused, needs of the victim, and interests of the public. *Second*, my experience as a research assistant allowed me to hone my legal research and writing skills to produce publication-ready material. *Finally*, my time in civil litigation since graduation has shown me real-life court experience in multiple areas of practice that include commercial, constitutional law, and intellectual property litigation. All of these experiences have given me a legal toolkit which will allow me to contribute meaningfully to your chambers.

Attached for your review are my résumé, law school transcript, writing sample, and list of references. The writing sample is an excerpt from a memorandum of law I drafted for co-counsel regarding a contested divorce. Contact information for Vanderbilt University Professors Mike Vandenbergh and Margaret Blair, as well as attorney Justin Kinsland with whom I regularly work, will also accompany my application packet. Thank you for considering my application. Please feel free to contact me if I can provide you with any additional information.

Respectfully,

Daniel Lewis

DANIEL NEAL LEWIS, JD, MBA

1004 Jackson Street, Nashville, Tennessee 37208
731-697-4142 www.linkedin.com/in/danielneallewis/ daniel@tristarlawfirm.com

EXPERIENCE

TRISTAR LAW, Nashville, TN, *Founding Attorney* **2016-Present**
General civil litigation firm. Handled all clients matters, from initial intake to final case disposition. Practice focused on commercial and IP litigation.

GARMON & ASSOCIATES, Birmingham, Alabama, *Associate, Constitutional Law* **2019-Present**
Consulted on collective actions implicating Constitutional rights, with a focus on prisoners and minors.

HILLIARD, MARTINEZ, AND GONZALES, Corpus Christi, TX **2020**
Associate, Mass Torts
Handled a caseload of 90,000 with a three-attorney team, including lead attorney on 6,000 cases. Case matters included Zantac (cancer, birth defects), opioids (addiction), Roundup (Non-Hodgkin's lymphomas), Singulair (adverse neuropsychiatric effects), HIV and Hep.-C treatment/PrEP (osteoporosis and kidney failure), and Evenflo booster seats (inadequate child safety).

VANDERBILT UNIVERSITY LAW SCHOOL, Nashville, TN **2014-2015**
Research Assistant, Professor Mike Vandenbergh (Environmental Law)
Efficacy of Forest Sustainability Council (FSC) and feasibility of carbon taxing. Research later incorporated into *BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE*, Vandenbergh and Gilligan (N.Y., NY: Cambridge U. Press, 2017).
Research Assistant, Professor Margaret Blair (Corporate Law)
Remarks by Del. C.J. Strine on *eBay v. Newmark* and its mandatory approach to corporate purposes (i.e., "shareholder value maximization")
Survey of publications citing Thomas Donaldson's "theory of the corporation" Research incorporated into Margaret Blair, *Of Corporations, Courts, Personhood, and Morality: Essay in Honor of Thomas Donaldson*, 25 BUSINESS ETHICS QUARTERLY, 4, 415 (2016).

TENNESSEE DISTRICT ATTORNEYS GENERAL, 24th Judicial District, West TN, *Summer Intern*, **2014**
State v. Zach Adams et al. (**Holly Bobo murder/rape/kidnapping case**): Meetings w/ TBI personnel, investigators, and victim's family to discuss new evidence, case status, and prosecution strategy; researched capital murder cases w/o victim's body
Other cases: $100k+ MediCare fraud case; $10k+ firearms theft/assault case ultimately bound over to federal court

SERVALL, Paris, TN, *Chief Financial Officer and Vice President* **2008-2013**
Diversified services. Among 25 largest pest control companies in the US, 2nd largest based in TN. ~250 employees.
$30M revenues; Financial modelling, forecasting, financial statement analysis, M&A due diligence
Accomplishments: Reduced annual fleet costs by $200k (25%); Decreased annual chemical expenses by $250k (10%).

EDUCATION

VANDERBILT UNIVERSITY LAW SCHOOL, J.D., Law & Business Certificate, GPA: 3.206 **2016**
VLS Rep. (2013-2015), Young Lawyers, Nashville Bar Assoc.; Treasurer (2014-2015), Representative (2013-2016), VLS Bar Assoc.; VP (2014-2015), Federalist Society; Hyatt Fund Board (2014-2015); VP (2014-2015), Law & Business Society; Mr. VLS (2013-2014); Mock Trial Semi-finals

UNIVERSITY OF TENNESSEE AT MARTIN, M.B.A., highest honors, Banking & Finance, GPA: 4.000 **2016**
Thesis: *Neel Kashkari's Criticism of "Too Big to Fail" Through the Lens of Bagehot, Friedman, and Bernanke*

COLUMBIA UNIVERSITY, Fu Found. School of Engineering & Applied Sciences, M.S., honors, Financial Engineering, GPA: 3.6 **2010**
Awards: Dean's Leadership Society; Fu Foundation SEAS Ambassador (dept. nom.); Columbia Alumni Representative Committee.
Thesis: *Neuropsychological Perspectives on Branding and Marketing Failures with "New Coke"*

MIDDLE TENNESSEE STATE UNIVERSITY, B.B.A., cum laude, Finance; Biology; and Psychology, Inst. GPA: 3.795 **2008**
Awards: Dean's list all semesters; Nat'l Dean's List; 3.75+ GPA all semesters, up to 30 hours/semester; Sole TN nom., Golden Key Int'l Scholar, Dubai Del. on Business; 1st place, team captain, Nashville JA Investment Challenge; Psi Chi Honor Society.

HARVARD UNIVERSITY, Visiting Student, Organic Chemistry **2007**
Harvard Summer Chorus; Intramural soccer team captain.

JACKSON STATE COMMUNITY COLLEGE **2004-2006**

COMMUNITY INVOLVEMENT

Eagle Scout. Board of Directors, Middle TN Council, Boy Scouts of America. Unit Commissioner, James E. West District.
Member, Buchanan Lodge #772; Al Menah Shriners; Nashville Scottish Rite.
Avid Mountaineer. Aconcagua (6,961m); Cerro Bonete (6,759m); Denali (6,190m); Mt. Rainier (4,392m); Mt. Adams (3,743m); Mt. Baker (3,288).

DANIEL NEAL LEWIS, JD, MBA

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CASES OF NOTE

Constitutional Law

- *Gregory Snow* et al. *v. Etowah County Sheriff's Dept.* et al., No. 21-10365 (11th Cir., filed Feb. 25, 2021), appealed from 4:20-cv-00344-ACC (N.D. Ala., Nov. 24, 2020). 42 U.S.C. 1983 and A.D.A. collective action re: prison overcrowding.
- *Gabriel Byrdsong* et al. *v. A&E Television Networks, L.L.C.* et al., No. 31-CV-2021-900135.00 (Ala. Cir. Ct., Etowah Cty, filed Mar. 20, 2021). Unjust enrichment and defamation collective action re: profiteering from prison "documentary."

Intellectual Property

- *3rd Eye Surveillance, LLC & Disc. Pat., LLC v. Gen. Dynamics One Source, LLC et al.*, civ. No. 15-501-C (Ct. Fed. Cl., filed May 5, 2015). Kennedy Law, plaintiff counsel. Patent infringement of apparatus and process claims re: integrated surveillance analytics by defense contractors.
- *Battery Conservation Innovations, LLC v. Acco Brands Corp.* (N.D. Ill., 2022). Patent infringement of apparatus and process claims re: battery-conserving electronic device for wireless video game controller.
- *Qualitative Data Sol., LLC v. ABB; Siemens; Hubbell Bldg. Automation; Amber Sol., Inc.; Insteon/SmartLabs, Inc.; Frontpoint Sec.; /Lucis Tech., Inc.* (N.D. Ohio, 2022). Patent infringement of apparatus and process claims re: smart receptacles connected to power circuit of a building.
- *Touchpoint Projection Innovations, LLC v. StackPath, LLC; Tata Comm., Inc.; CDNetworks, Inc.* (N.D. Ohio, 2022). Patent infringement of apparatus and process claims re: data communications network connected by gateways.

Commercial Litigation

- *Caldwell v. Move On, et al.*, 18-c-633 (Tenn. Cir. Ct., Davidson Cty. 2021). $6.9 million implied contract partnership dispute.
- *Hagye,* et al. *V. Servall, LLC*, 1:20-cv-01196-JDB-jay (W.D. Tenn. 2021). Defendant counsel in $6 million Fair Labor Standards Act (FLSA) collective action alleging 29 U.S.C. 216 minimum wage and overtime violations. Settled prior to class action certification.
- Won additional $475k in contested divorced by arguing for transmutation of marital property despite ante-nuptial agreement.

Mass and Toxic Torts

- *Waste Serv. of Decatur, LLC v. Decatur County, Tenn. v. Waste Indus. USA, LLC, Tenn. Aluminum Processors, Inc., Smelter Serv. Corp.*, 1:17-cv-01030-STA-jay (W.D.Tenn. Dec. 5, 2019). Sherrard Roe, plaintiff counsel. Toxic tort re: aluminum dross & slag disposal and EPA violation.
- *Phillip v. C.R. Bard Inc. et al*, 3:19-cv-01132-GTS-ML (N.D.N.Y.). Counsel for plaintiffs in MDL concerning Inferior Vena Cava (IVC) filter.
- *In Re: Zantac (Ranitidine) Prod. Liab. Litig.,* 20-md-2924, MDL No. 2924 (S.D. Fla., filed Feb. 6, 2020). 3-member team, 60,000 clients.
- *In Re: Nat'l Prescription Opiate Litig.,* 1:17-md-2804, MDL 2804, (N.D. Ohio, filed Dec. 2017). 3-member team, 20,000 clients.
- *In Re: Roundup Prod. Liab. Litig.,* 16-md-2741-VC, MDL No. 2741 (N.D. Cal., filed Oct. 4, 2016). Product linked to Non-Hodgkin's lymphomas.
- *Stephanie Hammar and R.S.B. v. Merck & Co. Inc.,* 1:2020cv01402 (E.D. Wis., filed Sept. 9, 2020). Filing attorney. Among the nation's first lawsuits re: adverse neuropsychiatric events resulting from Singulair. Sole attorney, 6,000 clients.
- *Holley et al v. Gilead Sci., Inc.*, No. 3:2018cv06972 – Doc. 75 (N.D. Cal. 2019). Re: tenofovir disoproxil (TDF) for HIV and HBV treatment/PrEP.
- *In Re: Evenflo Co, Inc., Mktg, Sales Practices & Prod. Liab. Litig.*, 1:20-md-02938, MDL No. 2938 (D. Mass., filed June 3, 2020). Re: "Big Kid" booster seats.

Daniel Lewis
Vanderbilt University Law School
Cumulative GPA: 3.206

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Brian Fitzpatrick	B	4.00	
Contracts	Rebecca Allensworth	B+	4.00	
Legal Writing I	Barbara Rose, Jason Sowards	B	2.00	
Life of the Law	Suzanna Sherry, James Rossi	P	1.00	
Torts	Edward Cheng	B-	4.00	

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Corporations	Margaret Blair	B+	3.00	
Criminal Law	Nancy King	B+	3.00	
Legal Writing II	Barbara Rose	B-	2.00	
Property	Michael Vandenbergh	B	4.00	
Regulatory State	Edward Rubin	A-	4.00	

Summer 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Externship-Outside Nashville	Susan Kay	P	6.00	Included death penalty trial (Holly Bobo kidnapping/rape/ murder).
Research Assistant for Credit	Margaret Blair	P	1.00	
Research Assistant for Credit	Michael Vandenbergh	P	1.00	

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Campaign Finance & Elections	Robert Cooper, John Ryder	A-	2.00	
Comparative Corporate Governance	Georg Ringe	P	1.00	
Corporate Governance & Control	Randy Holland	P	1.00	
Corporate Litigation	Justin Shuler, Sam Glasscock	P	1.00	
Franchise Law	William Whalen	B+	2.00	
Government Contract Law	Darwin "Skip" Hindman	B	2.00	
IP Licensing	Suzanne Kessler	P	1.00	
Negotiation	Cheryl Mason	P	1.00	

The Criminal Jury Trial	Allison Danner	P	1.00
The Law of Secrets and Lies	Joseph Little	B	2.00

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law I	Robert Mikos	B-	3.00	
Contemporary Issues in Real Estate	Martin Heflin	AU	3.00	
Establishment & Management of Non-Profit Organizations	Casey Summar-Gill	B+	1.00	
Federal Tax Law	Nancy Hale	B+	3.00	
Introduction to Private Equity	Abrar Hussain, Arshad Ahmed	P	1.00	
Mergers & Acquisitions	James Overby, Robert Rader	P	1.00	
Mergers & Acquisitions Deal Dynamics	Leo Strine, David Katz	AU	1.00	
Real Estate Development	Grant Kinnett, Dirk Melton	AU	3.00	
Real Estate Finance & Development	Herwig Schlunk	B+	3.00	
Succession Planning	Jerome Hesch	P	1.00	
Wills and Trusts	Jeffrey Schoenblum	B+	4.00	

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Actual Innocence	Terry Maroney	B-	3.00	
Human Trafficking	John Cotton Richmond	AU	1.00	
Mediation	Larry Bridgesmith	P	3.00	
Partnership Taxation	Beverly Moran	A-	3.00	
Professional Responsibility	David Hudson	B	3.00	
Securities Regulation	Yesha Yadav	B+	3.00	
Supervised Research Project	Edward Rubin	A	2.00	

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law (Limited)	Edward Rubin	A	3.00	
Corporate Compliance & Internal Investigations	Eli Richardson, Patricia Eastwood	W	3.00	
Land use Planning	Christopher Serkin	B	3.00	
Private Mergers & Acquisitions	Howard Lamar, Robert Reder	P	1.00	
Regulation of Financial Institutions	Phillip Morgan Ricks	B	3.00	

Transactional Practice Workshop	Andrew Kaufman	P	1.00

Grading System Description
A+ 4.3 A+ 4.0 A 4.0 A- 3.7 B+ 3.3 B 3.0 B- 2.7 C+ 2.3 C 2.0 C- 1.7 D+ 1.3 D 1.0 D- 0.7 F 0.0

Daniel Lewis
Columbia University, The Fu Foundation School of Engineering and Applied Science
Cumulative GPA: 3.600

Summer 2008

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Industrial Economics	Soulaymane Kachani	A	3.00	
Logistics & Transportation	Soulaymane Kachani	A-	3.00	

Fall 2008

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Industrial Budgeting & Financial Control	Lucius Riccio	A-	3.00	

Spring 2009

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Design & Management of Production & Service Systems	Lucius Riccio	A	3.00	
Introduction to Operations Research: Deterministic Models	Unknown	B+	3.00	
Introduction to Operations Research: Stochastic Models	Unknown	B	3.00	

Summer 2009

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Industrial Forecasting	Kosrow Dehnad	B	3.00	

Fall 2009

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Managing Engineering & Construction Processes	Mysore Nagaraja	A	3.00	
Pricing Models for Financial Engineering	Kosrow Dehnad	A+	3.00	

Spring 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Artificial Organs	Edward F. Leonard	B-	3.00	

THE UNIVERSITY OF TENNESSEE MARTIN

Student No: 960176776 Date of Birth: 31-MAY-1984 Date Issued: 09-FEB-2022

Record of: Daniel Neal Lewis
1004 Jackson St
Nashville, TN 37208-3118

Issued To: Daniel Lewis
issued to student
pdf

Course Level: Graduate

Current Program
College : Business & Global Affairs
Major : Business Administration

Comments:
Comprehensive exam satisfied 12/9/2016
Degree Cum: EH= 40.00 GH= 34.00 Q= 136.00 GPA=4.00
SS# ***-**-8082
This transcript is issued by:
The University of Tennessee at Martin

Degrees Awarded Master Business Admin 10-DEC-2016
Primary Degree
College : Business & Global Affairs
Major : Business Administration
Maj/Concentration : MBA: General Business Option

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:						
Spring 2014		Vanderbilt Univ				
BLAW	7GR	Legal&Ethical Envir of Bus	3.00	GRT		
Ehrs: 3.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
Spring 2012		Univ Memphis				
ACCT	711	Accounting for Managerial Dec	3.00	GRT		
Ehrs: 3.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00						
INSTITUTION CREDIT:						
Spring 2016						
Business & Global Affairs						
Business Administration						
BADM	705	Sales&Mktg Res Fin Serv Ind	3.00	A	12.00	
BADM	723	Creativity, Innovation&Design	1.00	A	4.00	
ECON	710	Managerial Econ	4.00	A	16.00	
FIN	721	Banking&Fin Serv	3.00	A	12.00	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
MKTG	710	Marketing Strategy	4.00	A	16.00	
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 60.00 GPA: 4.00						
Academically Eligible						
Fall 2016						
Business & Global Affairs						
Business Administration						
AGEC	710	Commodity Futures & Options	3.00	A	12.00	
BADM	721	Critical Thinking	1.00	A	4.00	
BADM	722	Ldrshp Group Dynamics Teamwork	1.00	A	4.00	
FIN	710	Corporate Fin Mgt	4.00	A	16.00	
MGT	710	Organization Theory & Design	4.00	A	16.00	
MGT	730	Operations Mgt	3.00	A	12.00	
MGT	790	Strategic Mgmt & Bus Policy	3.00	A	12.00	
Ehrs: 19.00 GPA-Hrs: 19.00 QPts: 76.00 GPA: 4.00						
Academically Eligible						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	34.00	34.00	136.00	4.00
TOTAL TRANSFER	6.00	0.00	0.00	0.00
OVERALL	40.00	34.00	136.00	4.00

********** END OF TRANSCRIPT **********

The University of Tennessee at Martin
Registrar

DANIEL NEAL LEWIS
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WRITING SAMPLE

The attached writing sample is a memorandum I submitted, as lead counsel for the Plaintiff, to my co-counsel in preparation for litigation. The case involved a contested divorce in which Plaintiff sought to invalidate and thereby avoid enforcement of an Antenuptial Agreement contemporaneously signed with the parties' marriage. Accordingly, the memorandum examined three issues:

1. Did the circumstances surrounding the parties' signing of the Antenuptial suggested duress, undue influence, and lack of knowledge?
2. Did Plaintiff financially contribute to the construction of marital home B, when the funds used for such construction came from the joint checking account of Plaintiff and Defendant, the account's funds came from the sale of Defendant's separate property, and Plaintiff was listed as a co-seller of Defendant's separate property?
3. Is a clause stipulating that marital property should be divided according to financial contributions analogous to a forfeiture clause and therefore void as against public policy, when Plaintiff is not gainfully employed outside the home and therefore unable to financially contribute to any marital property?

To preserve client confidentiality, all individual names and locations have been changed, and some portions have been redacted (as indicated in brackets in the text). Additionally, I have abridged the memorandum to include only the Statement of Facts section in part and the Discussion section in its entirety. Furthermore, I have received permission from co-counsel to use this memorandum as a writing sample.

Jane Doe v. John Doe, Divorce
[redacted] County Chancery Court File No.: [redacted]

MEMORANDUM

TO: Tim Potter, Co-Counsel

FROM: Daniel Lewis, Lead Counsel

RE: *Doe v. Doe* Divorce Proceeding

DATE: October 5, 2018

Statement of Facts

The marital home is held as "tenants by the entireties," but Clause 8 of the parties' Antenuptial Agreement contains a provision which states the following:

> In the event that the parties may acquire property subsequent to their marriage and hold same as tenants by the entireties…, the parties agree that in the event of a divorce or legal separation, their interests in such property as described in this paragraph shall be divided between them strictly in accordance with their financial contributions to the purchase, improvements and maintenance of said property, and not based upon any other criteria. Antenuptial Agreement, Clause 8.

Notwithstanding this clause, Plaintiff has had little to no income throughout the course of the parties' marriage as the result of her acquiescence to Defendant's repeated and vehement encouragement that she not seek work outside the home.

Plaintiff and Defendant are in the process of constructing a new marital residence (hereafter referred to as "marital home B"). Defendant owned their former marital residence (hereafter referred to as "marital home A") as his separate property. When marital home A was sold, Plaintiff was listed as a co-seller on all sale documents. Funds received from the sale were drawn on a check drafted to "Jane Doe and John Doe" and deposited into the parties' joint checking account. Payment for the construction of marital home B has been rendered to all contractors and sub-contractors exclusively from this joint checking account.

…

I. The Antenuptial Agreement Should be Held Invalid and Unenforceable

A. Introduction to Enforceability

First, in order to be held enforceable, "an antenuptial agreement must have been entered into freely, knowledgeably, and in good faith and without the exertion of duress or undue influence *Tenn. Code Ann.* § 36-3-501; *Randolph v. Randolph*, 937 S.W.2d 815, 819 (Tenn. 1996); *Cary v. Cary*, 937 S.W.2d 777, 782 (Tenn. 1996). The burden of proof to establish these elements rests with party seeking to enforce the antenuptial agreement. *Randolph*, 937 S.W.2d at 821." Furthermore, both the *Tenn. Code Ann.* § 36-3-501 as well as the case law "require an inquiry into the circumstances surrounding the negotiation and execution of an antenuptial agreement before it can be enforced." *Boote v. Shivers*, 198 S.W.3d 732, 741 (Tenn. Ct. App. 2005).

Second, while courts have indicated hesitance to promulgate a bright-line rule regarding the burden of proof necessary to establish the enforceability of any specific antenuptial agreement, they have nonetheless offered guidance as to what factors may be particularly important in a given situation. For example, the court in *Grubb v. Grubb*, No. E2016-01851COA-R3-CV, Lexis 392, 39-40 (Tenn. Ct. App. 2017), wrote, "Most salient to us are the timing of the wedding in relation to Wife's being asked to sign the Agreement and the parties' dramatic disparity in sophistication." (emphasis added).

Finally, antenuptial agreements are to be construed in a manner that effects the intent of the parties, rather than interpreted in a strictly textual manner. Accordingly, because antenuptial agreements are favored by public policy, "[they are] to be construed liberally to effect the intention of the parties, irrespective of the ordinary legal construction of words used therein and

of externals and the form of the instrument; indeed, form will be totally disregarded to get at the substance of the intention of the parties…" *Sanders v. Sanders*, 288 S.W.2d 473, 477-478 (Tenn. App. 1995); see also, *Seifert v. Seifert*, No. E2016-01340-COA-R3-CV, Lexis 325, 12 (2017 Tenn. App.) (citing *City of Cookeville ex rel. Cookeville Reg'l Med. Ctr. V. Humphrey*, 126 S.W.3d 897, 904 (Tenn. 2004); *Wilson v. Moore*, 929 S.W.2d 367, 373 (Tenn. Ct. App. 1996)).

B. Plaintiff Had Insufficient Knowledge of the Agreement, Because Defendant Made Insufficient Frank and Full Disclosure of His Finances.

A valid and enforceable prenuptial or antenuptial agreement requires that each party provide a frank and full disclosure of their respective financial holdings. "[T]he spouse seeking to enforce an antenuptial agreement must prove, by a preponderance of the evidence, either that a full and fair disclosure of the nature, extent, and value of his or her holdings was provide to the spouse seeking to avoid the agreement, or that disclosure was unnecessary because the spouse seeking to avoid the agreement had independent knowledge of the full nature, extent, and value of the proponent spouse's holdings.". Among the factors considers when making a determination of whether the disclosure was sufficient are "the relative sophistication of the parties, the apparent fairness or unfairness of the substantive terms of the agreement, and any other circumstance unique to the litigants and their specific situation," with other important considerations including "the timing of signing…in relation to the wedding date, the relative sophistication of the parties, and the opportunity of parties to secure independent counsel in order to review an antenuptial agreement." *Grubb v. Grubb*, Lexis 392 at 32-33, 36-37 (emphasis added).

For example, an antenuptial agreement was held invalid where the wife was

"unsophisticated in legal or financial matters, and, with a limited awareness of Husband's financial status, including the value of his assets," underwent a haphazard, deceptive, and generally inadequate process" in which she was forced to choose between hurriedly signing the agreement or delaying/cancelling the wedding. *Stancil v. Stancil* No. E2011-00099-COA-R3CV, Lexis 29, 5-6 (2012 Tenn. App.). Similarly, the *Grubb* court held an antenuptial agreement invalid where the wife was rushed to sign the agreement, signing "only two days before departing on vacation to be married." Furthermore, the *Grubb* court found that "[w]hile the Wife could have attempted to delay the wedding date until she could get her own lawyer, we will not close our eyes and ignore the immense gap in the parties' education and sophistication and experience in business affairs. Wife's opportunity to secure independent counsel to review the Agreement was illusory in practice." *Grubb*, Lexis 392 at 37-38.

The Plaintiff at bar lacks the education, sophistication, and experience in business affairs which is possessed by the Defendant. Additionally, Plaintiff was forced to choose between cancelling the wedding or hurriedly signing the agreement, with Defendant telling her repeatedly, "Sign it, or we'll call the whole thing off," ostensibly placing her under greater pressure than the wife in *Stancil*. Furthermore, she was rushed to sign the agreement only two days before the wedding, even closer to the wedding date than the wife in *Grubb*. Financial disclosures were provided only five days before the signing of the agreement, and individuals such as Defendant's brother and Defendant's former girlfriend have expressed suspicion that Defendant frequently hid rebates received by his company from vendors. While Plaintiff was afforded the opportunity to secure independent counsel, pressure from Defendant and the immense gap between Plaintiff's and Defendant's sophistication made this opportunity illusory in practice. Plaintiff received neither frank and full disclosure of Defendant's assets, nor

sufficient time to examine the same. Thus, the antenuptial agreement should be held invalid and unenforceable as a result of insufficient financial disclosure.

C. Defendant Did Not Engage in Good Faith Dealing.

Antenuptial agreements must be entered into with no malicious intent on the part of either party. "The participants in an antenuptial contract do not stand at arm's length with reference to each other. Their relation is one of highest trust and confidence. It demands the utmost good faith on the part of each. This is a necessary concomitant of the execution of such an instrument, and the performance of its stipulations must also be in the same spirit." *Sanders*, 288 S.W.2d at 478 (quoting 26 Am. Jur. 2d Contracts, Sec. 280, pp. 886, 887) (internal quotations omitted).

Plaintiff in the case at bar was repeatedly told by Defendant, "The new house will be half yours," or some variant thereof, causing her to believe the same. Furthermore, Defendant made similar statements to multiple other individuals regarding Plaintiff's interest in the home. First, such statements—as well as the home's being titled as "tenants by the entireties"—clearly indicate Defendant's intent that Plaintiff be entitled to half ownership of the home or, alternatively, half the value of the home in the event of its disposition. Second, these statements create a reasonable expectation on the part of the Plaintiff that she would truly own half of the home to do with as she sees fit. Finally, if Defendant made such representations and created such an expectation with no true interest in Plaintiff being a joint owner, such intentions indicate that Defendant has abused Plaintiff's trust and confidence, and thereby not entered into the Antenuptial Agreement with "the utmost good faith." Such a violation of Plaintiff's trust and confidence is compounded by the fact that Defendant is more educated, is almost twenty years older, has greater business experience, and is generally a more sophisticated contracting party than Plaintiff. Accordingly, the Antenuptial Agreement should be held invalid and unenforceable

as a result of Defendant's lack of good faith in executing the instrument and seeking the performance of its stipulations.

D. Despite Plaintiff Obtaining Independent Counsel, Other Factors Weigh Against the Enforceability of the Antenuptial Agreement.

The presence of independent counsel strongly suggests enforceability but is not dispositive of the issue. "While the participation of independent counsel representing each party is not the sine qua non of enforceability, it provides the best assurance that the legal prerequisites will be met and that the antenuptial agreement will be found enforceable in the future. [citations omitted]." *Boote*, 198 S.W.3d at 741. Furthermore, "the Tennessee Supreme Court has expressly recognized that 'representation by independent counsel may be the best evidence that a party has entered into an antentupial agreement voluntarily and knowledgeably. *Randolph v. Randolph* 937 S.W.2d 815, 822." *Id* at 743 (internal quotations omitted). However, regarding independent counsel not being totally dispositive of the issue of enforceability, "the presence or absence of independent counsel *is just another factor to be considered* when determining if the agreement was entered into knowledgeably. [Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. Am. Acad. Matrim. Law. 1 (1992), 22; *Kahn v. Kahn*, 756 S.W.2d 685, 695 (Tenn. 1988)]." *Randolph*, 937 S.W.2d at 822.

The wife in *Boote* was represented by independent counsel throughout the entire antenuptial negotiation process, with the attorney possessing a draft of the antenuptial agreement six weeks prior to the wedding Her attorney "went over [the agreement] with her line by line in his office three weeks before the wedding." *Boote*, 198 S.W.3d at 745. Accordingly, the court held the parties' antenuptial agreement valid and enforceable. *Id* at 749.

Plaintiff in the case at bar did have independent counsel, but the other factors for enforceability of antenuptial agreement seem to shade in favor of declaring the agreement

invalid. Furthermore, Plaintiff's case is distinguishable from the wife in *Boote* in two ways. First, Plaintiff did not obtain financial disclosure statements until five days before signing the agreement and seven days before the wedding, while the wife in *Boote* obtained these statements three weeks before the wedding. Second, Plaintiff did not receive a line-by-line explanation from her attorney of the antenuptial agreement, while the wife in *Boote* did receive such an explanation and received it with ample time to consider the agreement's contents and voice her reservations about the same.

E. Plaintiff Had Insufficient Knowledge of the Agreement Because of the Disparate Ages and Levels of Sophistication, Education, and Experience of the Parties

The determination of whether each respective party meets the knowledgeability requirement for the enforceability of antenuptial agreements is a multi-factor test. Among these factors are the presence of independent counsel, "the comparative sophistication and business experience of the parties," and the timing of the agreement's execution.

In *Randolph*, the husband was an educated and experienced businessman, while the wife possessed no business knowledge nor experience. Furthermore, the couple executed their antenuptial agreement just one day before they were married. In *Grubb*, the husband was a "wealth, college-educated, and successful businessman," while the wife was "less than half of Husband's age, and a G.E.D. was the summit of her formal education,…[and] was financially dependent upon Husband." Furthermore, "[t]he balance of worldly sophistication in this relationship was decidedly one-sided." *Grubb*, Lexis 392 at 38-39. The courts decided in both *Randolph* and *Grubb* that the respective wives did not have full and fair chances to comprehend exactly what they were signing and, accordingly, found the respective antenuptial agreements unenforceable.

Plaintiff in the case at bar has no college degree and has only ever worked, if at all, as a teller during her adult life. In fact, the bulk of her adult years have been spent undertaking domestic duties as a homemaker. Conversely, Defendant holds a degree from UT Martin in Business Administration (including substantial coursework in Mechanical Engineering), was the Vice President of the multi-million dollar Doe Food Company for decades, and serviced accounts totaling close to $1 billion dollars. It is both fair and appropriate to observe that Defendant was and is in a vastly more advantageous position to understand the nature and consequences of any contract, including this antenuptial agreement. To quote the *Grubb* court, "The balance of worldly sophistication in this relationship [between Jane Doe and John Doe] was decidedly one-sided." *Grubb*, Lexis 392 at 38. Thus, because of the egregiously disparate levels of sophistication of the Plaintiff and Defendant, coupled with the limited time Plaintiff was given to sign the antenuptial agreement, the agreement should be held invalid.

II. Plaintiff Financially Contributed to the Marital Home Held as Tenants by the Entireties and Is Entitled to Fifty-Percent of the Value Thereof. Use of separate property to purchase marital property will create a presumption of transmutation, wherein separate property takes on the character of marital property; however, this presumption "can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate." *Hunter v. Hunter* No. M2002-02560-COA-R3-CV, Lexis 360, 18-19 (Tenn. Ct. App. 2005) (quoting *Eldridge v. Eldridge*, 137 S.W.3d 1, 12-13 (Tenn. Ct. App. 2002) (quoting *Batson v. Batson*, 769 S.W.2d 849, 858 (Tenn. Ct. App. 1988); see also *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 747 (Tenn. 2002).

In *Hunter*, the wife's use of a $5,000 premarital gift to purchase a jointly titled marital home created a presumption of transmutation. After this jointly titled marital home A was sold, the proceeds from the sale were used to purchase the land upon which the Husband and Wife

built their marital home B. Furthermore, nothing in the record indicated that marital home B was titled in a way other than either "joint tenancy" or "tenancy by the entireties." Finally, the court observed, "There is also no evidence of any circumstance or communication that occurred within the course of the marriage that would rebut the presumption of a gift to the marital estate." *Hunter*, Lexis 360 at 20-21. Thus, the marital home held in either "joint tenancy" or "tenancy by the entireties" was found to be marital property subject to equitable distribution.

In the case at bar, Defendant possessed marital home A located at 278 River Trace Drive in Dover, Tennessee, as separate property and used the funds from its sale to construct marital home B. Multiple factors, however, suggest that marital home B should be treated as marital property, was purchased with equal financial contributions from Plaintiff and Defendant, and should be divided equally between Plaintiff and Defendant in accordance with the Antenuptial Agreement. First, all of the sale documents for marital home A include Plaintiff as a co-owner. These include a) HUD settlement statement, b) repair and replacement release of all contingencies, c) TN residential property condition disclosure, d) additional required residential disclosures, e) confirmation of [real estate] agency status, f) contract for the sale and purchase of real estate. Second, all of these sale documents required Plaintiff's signature and/or initials for execution and consummation of the sale. Third, other parties integral and incidental to the sale—Defendant himself; buyers Garry and Carol Coogle; 1st Realty Group and its agent Glenda Ritchie; and Regions Bank, among others—and the signatures or endorsements thereof evidence their understanding of Plaintiff as co-owner of the funds from the sale.

Fourth, the funds from the sale were deposited into Regions checking account #0058564, a joint checking account owned by both Plaintiff and Defendant. Fifth, the money for the sale was held in escrow by Greer, Greer & Whitfield Attorneys, PLLC, a successor to the Greer & Greer Attorneys which originally drafted the Antenuptial Agreement and therefore implicitly

evidenced their understanding of Plaintiff as co-owner of the funds from the sale. Sixth, and of greatest importance to the sale proceeds because of its practical implications, the check issued as "sale proceeds" of 278 River Trace Drive lists "John Doe & Jane Doe" as joint payees, thus necessitating the signatures of both Defendant and Plaintiff in order to negotiate the instrument.[1] As a firm which frequently handles transactional matters, Greer & Greer would possess the knowledge that joint payees must each sign the check, not to mention that joint account holders may each stop payment of the account's checks or even close the account.[2]

Seventh, as in *Hunter*, marital home B has never been titled in a way other than "tenancy by the entireties." Finally, neither circumstance nor communication rebuts the presumption that Defendant made a gift to the marital estate through the course of the following of events: selling marital home A with Plaintiff as co-seller, rendering the funds received from this sale marital property through the closely-related doctrines of transmutation and commingling as well as through gift, and using these funds to construct marital home B titled as "tenants in the entireties." Rather, Defendant's own words strengthen the presumption of marital property with equal financial contributions subject to equal distribution, wherein he has told countless individuals that marital home B is "Jane's house, too," and similar variants thereof.

Plaintiff was a co-owner of the $913,947.18 deposited into the Regions joint checking account #58564 and is, by virtue of the funds' character as marital property, fifty-percent coowner of any purchases of marital property made using the same funds. To hold otherwise would be to disregard the clear purpose of holding funds in a joint checking account, which is to

[1] *U.C.C.* § 3-110(d) (2002). "…If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them…"

[2] *U.C.C.* § 4-403 (2002). "A customer or any person authorized to draw on the account if there is more than one person may stop payment of any item drawn on the customer's account or close the account…If the signature of more than one person is required to draw on an account, any of these persons may stop payment or close the account."

make the funds marital property. Had Defendant's intended purpose been only to afford Plaintiff access to the account, Defendant could have maintained his own separate account and made Plaintiff a signatory on the same. Furthermore,

Thus, Plaintiff financially contributed to the construction of marital home B, which is now held as "tenants by the entireties," and, in accordance with Clauses (1)(C) and (8) of the Antenuptial Agreement, is entitled to 50% (fifty-percent) of the value of marital home B in a divorce proceeding which seeks to dispose of marital assets.

III. Clause 8 of the Antenuptial Agreement Is Functionally a Forfeiture Clause Which Should be Held Invalid as Against Public Policy.

Antenuptial agreements must be entered into with no malicious intent on the part of either party. "The participants in an antenuptial contract do not stand at arm's length with reference to each other. Their relation is one of highest trust and confidence. It demands the utmost good faith on the part of each. This is a necessary concomitant of the execution of such an instrument, and the performance of its stipulations must also be in the same spirit." *Sanders*, 288 S.W.2d at 478 (quoting 26 Am. Jur., Sec. 280, pp. 886, 887) (internal quotations omitted).

In *Sanders*, a clause in the antenuptial agreement with a forfeiture clause was held not to violate public policy, but only because the clause's effect was not to discourage divorce. However, dicta of the *Sanders* court indicates that had the forfeiture clause had the following effect contemplated by the lower court, it would have held the clause contravened public policy:

> [The forfeiture clause] would cause the party filing a divorce action to forfeit all of his right, title and interest in the joint property of parties. While it is desirable that the parties not seek a divorce, certainly neither husband nor wife should be to live with the other regardless of the conduct of the other party. For fear of a great financial loss, great hardship could be imposed upon the party to the contract. He or she might be forced to endure abuse, insult, embarrassment or the grossest sort of cruel and inhuman treatment. To permit such an agreement to stand would impose a penalty for seeking a legal remedy for an impossible situation. *Sanders*, 288 S.W.2d at 478.

Plaintiff in the case at bar is forced to forfeit nearly all of her right, title and interest in the joint property of the parties if the antenuptial agreement is held valid. The agreement stipulates that marital property shall be divided according to financial contributions, yet Defendant repeatedly and vehemently encouraged Plaintiff not to work outside the home. Accordingly, Plaintiff has had little to no income throughout the course of her marriage to Defendant. As a result of remaining a homemaker, pursuant to Defendant's express wishes, Plaintiff has not been able to contribute financially to marital property. If held valid and enforceable, the clause in question has the effect of forcing Plaintiff to forfeit her interest in all marital property. In effect, the clause in the antenuptial agreement functions as a forfeiture clause which adversely affects only the Plaintiff.

Furthermore, this is precisely the type of clause which dicta of the *Sanders* court declared would contravene public policy, forcing a party contemplating divorce to choose between great financial loss or enduring intolerable treatment. In her endeavor to avoid great financial loss, Plaintiff has been subject to a number of indignities by Defendant, including, but not limited to the following: verbal abuse; imputations of adultery; being cast in a false light as a "swinger" or "wife swapper"; embarrassed by Defendant's apparently adulterous conduct; distanced from her family members; guilted for offering care to her injured son and dying father; unknowingly tracked through her cellular telephone. Thus, the clause in the antenuptial agreement, which stipulates that marital property should be divided according to financial contributions, should be held invalid as a matter of public policy.

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WRITING SAMPLE

The attached writing sample is a Memorandum of Law I alone drafted, and my co-counsel Justin Kinsland and I submitted, in support of three Motions seeking to 1) enjoin sale of Defendant corporation stock, 2) enjoin issuance, allocation, and/or allotment of additional Defendant stock, and 3) recognize a constructive trust in which to hold Defendant stock. The case involved a partnership dispute in which our client, plaintiff James "Toddy" Caldwell, alleged that he had entered into a contract to purchase half of Move On Relocation, Inc., a moving and relocation services company, from Defendant Bryce Adkins in exchange for Caldwell's sweat equity working for the company. Adkins disagreed and sold fifty-percent of Move On to Glenn McConnell, and the pair then sold fifty-percent of their purported ownership to five other investors. Accordingly, the Memorandum of Law examined four issues II(A)—(D):

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* * *

I. FACTUAL BACKGROUND

* * *

II. LEGAL ARGUMENT AND ANALYSIS

A. A PARTNERSHIP IN MOVE ON RELOCATION, INC., EXISTS BETWEEN PLAINTIFF JAMES "TODDY" CALDWELL AND DEFENDANT BRYCE ADKINS

Under Tennessee law, a partnership may be either expressly or impliedly formed, with or without a written Partnership Agreement. Tenn. Code Ann. § 61-1-202(a); *Kudrewski v. Estate of Hobbs*, 2001 Tenn. App. LEXIS 561, *10, 2001 WL 862618 (Tenn. App. Ct., filed July 30, 2001) (citing *In re Taylor & Assoc., L.P.*, 249 B.R. 474, 479 (E.D. Tenn. 1998)). Accordingly, "Partnership agreement means the agreement, **whether written, oral, or implied**, among the partners concerning the partnership, including amendments to the partnership agreement." Tenn. Code Ann. § 61-1-101(7) (2010) (emphasis added). In *Bass v. Bass*, 814 S.W.2d 38 (Tenn. 1991), the Tennessee Supreme Court considered the issue of when an implied partnership is formed. * * * *Bass*, 814 S.W.2d at 41 (emphasis added); *see Messer Griesheim Indus., Inc. v. Cryotech of Kingsport, Inc.*, 45 S.W.3d 588, 605 (Tenn. App. Ct. 2001); *Story v. Lanier*, 166 S.W.3d 167 (Tenn. App. Ct. 2004).

Furthermore, "the receipt of a share of the profits of that business is *prima facie* evidence that a partnership exists." *Bass*, 814 S.W.2d at 41 (citations omitted); Tenn. Code Ann. § 61-1-202(3) ("A person who receives a share of the profits of a business sis presumed to be a partner in the business…"); *Reed v. Thurman*, 2015 Tenn. App. LEXIS 111, *23 (Tenn. App. Ct., filed March 10, 2015) (finding a partnership because, in part, plaintiff and defendant were "going to split the profits out of the [sale]").

* * *

In *Reed*, an implied partnership was found to exist Reed and Thurman despite Thurman's protestations that Reed never was a partner, in part because Thurman had previously characterized Reed as a partner in his will. *Id*. at 23. Similarly, in *Wyatt v. Brown*, 39 Tenn. App. 28 (Tenn. App. Ct. 1955), the intent of defendants Brown and Dearing to form a partnership was implied, with the court observing, "Obviously Dearing did intend to enter a partnership, for he stated that he was a partner." *Id* at 33.

In *Pettes v. Yukon*, 912 S.W.2d 709 (Tenn. App. Ct. 1995), an implied partnership was found to exist where an oral agreement was entered into between Pettes and Yukon. Although Yukon denied the oral agreement of partnership, he did "admit that at some point he discussed with Pettes that the future held the possibility of a partnership or co-ownership." *Id* at 715. Yukon held Pettes out to the public at large as a partner, and the chancellor in the lower court found that Yukon "strung the plaintiff along" by enticing him with the prospect of the partnership, *Id* at 715-6.

IN THE CASE-AT-BAR, an implied partnership exists between Mr. Caldwell and Mr. Adkins as a result of their February 2015 oral agreement to then form a partnership. As in *Reed* and *Wyatt*, Mr. Adkins characterized Mr. Caldwell as a "co-founder," a title which has been used interchangeably with "co-owner" by the Tennessee Court of Appeals. *Nelson v. Martin*, 1996 Tenn. App. LEXIS 63, *5, *12 (Tenn. App. Ct., filed Feb. 1, 1996) (referring to plaintiff Nelson first as co-founder and later as co-owner); *Reed* at 23; *Wyatt* at 33. Furthermore, as in *Pettes*, Mr. Adkins discussed partnership with Mr. Caldwell and "strung [Mr. Caldwell] along" by referring to him as a co-founder of the business to employees, customers, and the general public, by encouraging him to fulfill his "sweat equity" obligation under the Partnership Agreement, and referring to him as a co-owner of the business in communications between the two men. *Pettes* at

715-6; *Exhibits A, C*. Evidence—both implicit and explicit—of Mr. Adkin's clear reference to Mr. Caldwell's ownership is seen in various text messages between Mr. Caldwell and Mr. Adkins:

* * *

Additionally, written in the Tenn. Code Ann. and reiterated in *Bass*, Mr. Caldwell's receipt of a share of the profits of the business is *prima facie* evidence that a partnership exists. *Bass* at 41; Tenn. Code Ann. 61-1-202(3); *Exhibit B*; *see Reed* at 22-23; *Baggett* at 544. Evidence of Mr. Caldwell's receipt of a share of the profits of the business is seen in various text messages between Mr. Caldwell and Mr. Adkins:

* * *

B. SUBSEQUENT INVESTORS IN MOVE ON RELOCATION, INC., ARE NOT BONA FIDE PURCHASERS BECAUSE THEY HAD BOTH ACTUAL AND CONSTRUCTIVE NOTICE OF PLAINTIFF'S OWNERSHIP IN THE COMPANY.

* * *

Furthermore, a bona fide purchaser is required to perform due diligence regarding his or her purchase. Accordingly, a bona fide purchaser is "[c]hargeable with notice, by implication, of every fact affecting the title which would be discovered by an examination…of every fact as to which the purchaser, with reasonable prudence or diligence, ought to become acquainted." *Hall v. Hall*, 604 S.W.2d 851, 853 (Tenn. 1980) (quoting *Teague v. Sowder*, 121 Tenn. 132, 114 S.W. 484, 489 (Tenn. 1908)); *see Fenn*, 303 S.W.3d at 279. Accordingly, the *Williams* court elucidated the concept of "inquiry notice" as it applies to how a contract or agreement (e.g., a partnership agreement) "will prevail as against a subsequent purchaser with notice." *Williams v. Title Guaranty & Trust Co.*, 31 Tenn. App. 128, 212 S.W.2d 897, 901:

* * *

IN THE CASE-AT-BAR, Mr. Adkins had actual notice of the Partnership Agreement, as evidenced by the existence of at least one Partnership Agreement drafted by his attorney, Rachel Schaffer. Mr. McConnell attested in deposition to actual knowledge of "multiple Partnership Agreements." Mr. McConnell also attested in deposition to consulting with the law firm Bradley (formerly Bradley Arant Boult Cummings) about the validity of the Partnership Agreement. Nonetheless, the fact that the validity of Mr. Caldwell's and Mr. Adkins's Partnership Agreement was being questioned is an immaterial issue and sustains Mr. McConnell's actual notice of the Partnership Agreement. *Fenn*, 303 S.W.3d at 280. Furthermore, Mr. McConnell attested in deposition to discussing these "multiple Partnership Agreement [between Caldwell and Adkins]" with Freedman, Kustelski, Ansley, Metz, and Hodges. Additionally, even if neither Glenn McConnell and the five subsequent investors had no knowledge of the Partnership Agreement, they would all nonetheless be "chargeable with notice of all that an inquiry of [Mr. Adkins] would have disclosed." *Williams*, 212 S.W.2d at 901.

Regarding constructive notice, any investor of ordinary prudence would inquire as to the legal status of the Company shares which they were purchasing. *Hall*, 604 S.W.2d at 853. Even the most rudimentary inquiry would find that Mr. Caldwell was referred to as "co-founder" of the Company on its website and business cards, on Yelp.com reviews, and in an interview of Mr. Adkins published by the online journal of the Nashville Business Incubation Center. *Exhibits A, C.* Accordingly, all current investors in Move On Relocation, Inc., had constructive knowledge of the Partnership Agreement. As a result of their actual and constructive knowledge of Mr. Caldwell's ownership in the Company, Mr. Caldwell's interest in the Company will prevail against any interested asserted by Mr. McConnell or the five subsequent investors. *Williams*, 212 S.W.2d at 901.

THUS, for the foregoing reasons, Plaintiff has clearly proven that subsequent investors in Move On Relocation, Inc., should be found NOT to be *bona fide* purchasers without notice because they had both actual and constructive notice of Mr. Caldwell's ownership in the Company.

C. AN INJUNCTION IS BOTH NECESSARY AND PROPER TO PREVENT IRREPARABLE HARM TO PLAINTIFF.

* * *

IN THE CASE-AT-BAR, the court should impose an injunction pursuant to Tenn. R. Civ. P. 65.04(2) because the movant's rights have been, are being, and will continue to be violated, the movant will suffer irreparable harm absent the injunction, and the adverse party's actions will render final judgment ineffectual. First, Mr. Caldwell's rights "are being or will be violated by [the] adverse party," Mr. Adkins. *Id*. Mr. Adkins's has breached numerous rights of Mr. Caldwell, including the following: breach of the Partnership Agreement; fraudulent taking of Mr. Caldwell's one-half interest in Move On Relocation, Inc.; sale of Mr. Caldwell's one-half interest in the Company to Glenn McConnell; sale of Mr. Caldwell's one-half interest in the Company to Freedman, Kustelski, Ansley, Metz, and Hodges; depriving Mr. Caldwell of voting rights in the corporation; depriving Mr. Caldwell of his fair salary were he to still be employed by the Company; and retaining control of Mr. Caldwell's one-half interest in the Company, with benefits inuring to Mr. Adkins.

Additionally, Mr. Caldwell "will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action" if the injunction is not issued. *Id*. "The issuance of new stock can devalue or 'dilute' the worth of existing shares." *American Network Group v. Kostyk*, 1994 Tenn. App. LEXIS 619, *14, fn. 2 (Tenn. App. Ct., filed Oct. 26, 1994). Since Mr. Adkins's fraudulent conversion of Mr. Caldwell's one-half interest in the Company, the number

of outstanding shares has increased once to 100 (one-hundred) and again to 23,000 (twenty-three thousand). Furthermore, selling additional parties shares of stock in a corporation results "in the dilution of [a member's] percentage of in [the corporation]." *Green v. Champs-Elysees, Inc.*, 2013 Tenn. App. LEXIS 602, *23, 29-30 (Tenn. App. Ct., filed Sept. 11, 2013).

* * *

THUS, for the foregoing reasons, Plaintiff has clearly proven that enjoining Mr. Adkins, Mr. McConnell, the five subsequent investors, and Move On Relocation, Inc., from selling existing outstanding shares and issuing, allocating, and/or allotting additional outstanding shares is a necessary and proper remedy. The movant's rights have been, are being, and will continue to be violated, the movant will suffer irreparable harm absent the injunction, and the adverse party's actions will render final judgment ineffectual. Tenn. R. Civ. P. 65.04(2). Accordingly, this court should issue an Order enjoining the sale of existing outstanding shares and an Order enjoining the issuance, allocation, and/or allotment of additional outstanding shares in the Company.

D. RECOGNIZING A CONSTRUCTIVE TRUST IS A PROPER AND EQUITABLE REMEDY.

The Tennessee Supreme Court has recognized constructive trusts as equitable remedies to property held be a person or entity who should not hold it. As stated by the Court in *Sanders v. Forcum-Lannom, Inc.*, 225 Tenn. 637, 475 S.W.2d 172 (1972):

> [A] constructive trust arises contrary to intention and *in invitum*, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.

475 S.W.2d at 174 (citing *Covert v. Nashville, C. & St. L. Railway* (1948) 186 Tenn. 142, 208 S.W.2d 1008, 1 A.L.R.2d 154; *Central Bus Lines v. Hamilton Nat. Bank* (1951) 34 Tenn.App. 480, 239 S.W.2d 583). Further elucidating the "questionable means" contemplated by the

Sanders court through one may obtain property which he ought not, the court in *Galyon v. First Tennessee Bank Nat'l Ass'n*, 1991 Tenn. App. LEXIS 946, *4-5, 1991 WL 259473 (Tenn. App. Ct., filed Dec. 11, 1991).

In *Cato v. Mid-America Distrib. Ctrs*, 1996 Tenn. App. LEXIS 551, 1996 WL 502500 (Tenn. App. Ct. 1996), the Tennessee Court of Appeals upheld the trial court's imposition of a constructive trust upon the stock of a corporation in a derivative action alleging fraud and breach of fiduciary duty on the part of the corporation's directors. *Id* at 17. The *Cato* court reasoned that "The imposition of a constructive trust on [defendants'] shares will operate to avoid the unconscionable result of a recovery accruing to…and thereby remaining under the control of and inuring to the benefit of the very parties who occasioned the wrongs to both the corporation and the shareholders." *Id*.

IN THE CASE-AT-BAR, Mr. Adkins fraudulently induced Mr. Caldwell to perform work for Move On Relocation, Inc., with the understanding that Mr. Caldwell was a "co-owner" in the Company. Mr. Adkins then changed the Company's total outstanding shares from 1 (one) to 100 (one hundred) shares on or about December 7, 2018, and sold Mr. Caldwell's 50% (fifty-percent) share of the Company to Glenn McConnell on or about January, 2019. Thereafter, Mr. Adkins and Mr. McConnell changed the Company's total outstanding shares from 100 (one hundred) to 23,000 (twenty-three thousand) on or about July 12, 2019, and each then sold their 25% (twenty-five percent) respective share of Mr. Caldwell's ownership in the Company to five additional investors Freedman, Kustelski, Ansley, Metz, and Hodges. This issuance of additional stock and subsequent sale of the same was performed to fraudulently deprive Mr. Caldwell of his rightful 50% (fifty-percent) share of the Company, and allowing Mr. Adkins, Mr. McConnell,

and the five additional investors to retain control of their shares which inures to the benefit of the seven very parties who occasioned the wrongs to Mr. Caldwell.

THUS, for the foregoing reasons, Plaintiff has clearly proven that recognizing a constructive trust over the outstanding shares of Move On Relocation, Inc., is a proper and equitable remedy. Mr. Adkins, Mr. McConnell, and the five additional investors should hold their stock as constructive trustees for the benefit of Mr. Caldwell.

III. CONCLUSION

First, a partnership exists in Move On Relocation, Inc., exists between James "Toddy" Caldwell and Bryce Adkins as indicated by their conduct. The parties' intent to create a partnership is evidenced by the existence of a Partnership Agreement. Mr. Caldwell undertook his obligation to provide "sweat equity," and Mr. Adkins resultantly and repeatedly referred to Mr. Caldwell as "co-founder" and/or "co-owner" of the Company to its employees, its customers, the public *writ* large, and Mr. Caldwell himself. *Exhibits A, C*; *Reed*, 2015 Tenn. App. LEXIS at *23; *Wyatt*, 281 S.W.2d at 33; *Pettes*, 912 S.W.2d at 715-6. Additionally, Mr. Caldwell's receipt of a share of the profits of the business is *prima facie* evidence that a partnership exists. *Bass*, 814 S.W.2d at 41; Tenn. Code Ann. 61-1-202(3); *Exhibit B*; *see Reed* at *23; *Baggett*, 422 S.W.3d at 544. In short, Mr. Adkins's and Mr. Caldwell's behavior evidence a clear intent to form a partnership.

Second, subsequent investors Mitch McConnell, Joe Freedman, Joe Kustelski, David Ansley, Darren Metz, and Mike Hodges in Move On Relocation, Inc., are not bona fide purchasers because they had both actual and constructive notice of plaintiff's ownership in the company. *Henderson*, 369 S.W.2d at 556. Mr. Adkins discussed with Mr. McConnell about Mr. Caldwell's partnership, and Mr. Adkins and/or Mr. McConnell discussed with the five

subsequent investors about the same, giving all of them actual notice. Furthermore, a reasonably prudent investor would inquire as to the legal ownership of the Company, giving all of them constructive notice. *Hall v. Hall*, 604 S.W.2d at 853. Accordingly, Mr. Caldwell's interest in the Company will prevail against any interest asserted by Mr. McConnell or the five subsequent investors. *Williams*, 212 S.W.2d at 901. The fact that the validity of Mr. Caldwell's and Mr. Adkins's Partnership Agreement was being questioned is an immaterial issue. *Fenn*, 303 S.W.3d at 280.

Third, an Order enjoining the sale of the outstanding shares of Move On stock, as well as an Order enjoining the issuance, allocation, and/or allotment of additional shares of Move On Stock, is a necessary and proper remedy. First, Mr. Caldwell's "rights are or will be violated" by Mr. Caldwell, Mr. McConnell, and the five subsequent investors through their wrongful possession of Mr. Caldwell's one-half ownership in the Company. Tenn. R. Civ. P. 65.04(2). Additionally, Mr. Caldwell "will suffer immediate and irreparable injury, loss or damage" if his interest in the Company continues to be diluted through the issuance, allocation, and/or allotment of additional outstanding shares in the Company. *Id*. Mr. Caldwell "will [also] suffer immediate and irreparable injury, loss or damage" if his interest in the Company continues to be sold to individuals/entities who are not *bona fide* purchasers or individuals/entities who become *bona fide* purchasers through fraud, concealment, misrepresentation, or other artifice by Mr. Adkins, Mr. McConnell, and/or the five subsequent investors. *Id*.

Additionally, "the acts or omissions of [Mr. Adkins] will tend to render such final judgment [in the action] ineffectual." Tenn. R. Civ. P. 65.04(2). The continued issuance, allotment, and/or allocation of additional outstanding shares in the Company would render final judgment ineffectual in returning to Mr. Caldwell the control and benefits derived from his ownership

interest in the Company. Similarly, the continued sale of Mr. Adkins's, Mr. McConnell's, and the five subsequent investors' shares and the sale of the Company's outstanding shares would render any final judgment ineffectual by virtue of dilution by individuals and/or entities who become *bona fide* purchasers through fraud, concealment, or misrepresentation by Mr. Adkins, Mr. McConnell, or the five subsequent investors. No other remedy will adequately prevent harm to Mr. Caldwell and preserve the effectiveness of final judgment. *Vintage Health*, 309 S.W.3d at 467. In short, Mr. Caldwell's rights have been, are being, and will continue to be violated, Mr. Caldwell will suffer irreparable harm absent the injunction, and Mr. Adkins's actions will render final judgment ineffectual. Tenn. R. Civ. P. 65.04(2).

Finally, imposing a constructive trust on the shares of Mr. Adkins and any subsequent investors in the Company is a proper and equitable remedy because these parties, by both actual and constructive fraud, "obtained [and hold] the legal right to property which [they] ought not, in equity and good conscience, hold and enjoy." *Sanders*, 475 S.W.2d at 174. Accordingly, the imposition of a constructive trust will operate to prevent these shares from "remaining under the control of and inuring to the benefit of the very parties who occasioned the wrongs to [Mr. Caldwell]." *Cato*, 1996 Tenn. App. LEXIS at 16.

THUS, for the foregoing reasons, this honorable court should GRANT Plaintiff's Motion to Enjoin the Sale of Move On Relocation, Inc., Stock, Plaintiff's Motion to Enjoin the Issuance, Allocation, and/or Allotment of Additional Move On Relocation, Inc., Stock, and Plaintiff's Motion for Order Recognizing a Constructive Trust.

* * *

Applicant Details

First Name	**Jacqueline**
Middle Initial	**C**
Last Name	**Lewis**
Citizenship Status	**U. S. Citizen**
Email Address	**jcl301@georgetown.edu**
Address	**Address** Street **450 Massachusetts Ave. NW, Apt. 132** City **Washington** State/Territory **District of Columbia** Zip **20001** Country **United States**
Contact Phone Number	**7147853512**

Applicant Education

BA/BS From	**Biola University**
Date of BA/BS	**May 2018**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 23, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Immigration Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Cashin, Sheryill
Sheryll.Cashin@law.georgetown.edu
Shulman, Jeffrey
shulmanj@law.georgetown.edu
Stewart, Melissa
melissa.stewart@georgetown.edu
202-661-6528

References

Sheryll Cashin
Georgetown University Law Center
Carmack Waterhouse Professor of Law, Civil Rights and Social Justice
cashins@georgetown.edu
202-662-9053

Jeffrey Shulman
Professor of Law, Legal Practice
shulmanj@law.georgetown.edu
202.662.9917

Melissa Stewart
Georgetown University Law Center
Adjunct Professor of Law; Dash-Muse Teaching Fellow
Melissa.Stewart@georgetown.edu
202-661-6528

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jacqueline C. Lewis
450 Massachusetts Avenue N.W. #132
Washington, D.C. 20001

August 23, 2020

The Honorable Elizabeth W. Hanes
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

I am a rising third-year law student and Public Interest Fellow at Georgetown University Law Center. I am writing to apply for a clerkship in your chambers beginning in 2021. Clerking for you at the Eastern District of Virginia would be an extraordinary opportunity in allowing me to continue to pursue public service and prepare myself for a career in domestic human rights litigation.

When I applied to law school, I knew I wanted to pursue human rights work to hold States accountable for human rights abuses. The summer after my first year of law school I worked for the U.N. High Commissioner for Refugees in Malaysia. There, I became frustrated with the failure of the government to bring justice to the victims of human rights abuses and saw ways that these abuses paralleled issues in the United States. This pushed me to begin to pursue work in accountability mechanisms for these types of violations in my home country, eventually leading me to domestic human rights work in the United States.

Since then, I have sought out practical opportunities to improve my skills as an advocate. For example, I published a report analyzing the implementation of the Asylum Agreement between the U.S. and Guatemala as part of Georgetown Law's Human Rights Fact-Finding Practicum. Additionally, this summer at Robert F. Kennedy Human Rights, I will continue to hone my legal advocacy skills by preparing petitions and memoranda in support of their litigation and advocacy work. This upcoming fall, I will serve as a law clerk for the D.C. Office of Human Rights, which adjudicates civil rights complaints in the District of Columbia, drafting decisions and preparing briefs for review. I will also work as a research assistant for Professor Robin Lenhardt, drafting memoranda on the intersection of family law and racial justice.

I hope to have the opportunity to continue to practice skills that will make me a more effective human rights defender in the United States through domestic litigation and advocacy by clerking in your chambers in 2021. Thank you very much for your time and consideration of my application, and I hope to hear from you soon.

Respectfully,

Jacqueline C. Lewis

JACQUELINE LEWIS

450 Massachusetts Ave. NW, Apt. 132 Washington, D.C. 20001 • (714) 785-3512 • jcl301@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER **Washington, DC**
Juris Doctor Expected May 2021
GPA: 3.36/4.00
Journal: *Georgetown Immigration Law Journal*, Managing Editor
Activities: Public Interest Fellow, Human Rights Associates Program Member

BIOLA UNIVERSITY **La Mirada, CA**
Bachelor of Arts, *summa cum laude*, in Political Science May 2018
Honors: EKE Honor Society for Top Academic Achievement and Service to the University, J.O. Henry Award for Top Research Paper, Political Science Research Award, Top Student in Political Science
Activities: President of Club on Political and Civic Engagement, led voting registration efforts on campus

EXPERIENCE

DISTRICT OF COLUMBIA OFFICE OF HUMAN RIGHTS **Washington, DC**
Law Clerk *Expected* September 2020 – November 2020
- Drafted decisions of the D.C. Office of Human Rights which adjudicates civil rights complaints
- Prepared briefs and memoranda for the secondary review process before the Commission or Administrative Law Judge

RACIAL JUSTICE INSTITUTE, GEORGETOWN LAW **Washington, DC**
Research Assistant for Professor Robin Lenhardt August 2020 – Present
- Conducted legal research and drafted memoranda related to the intersection of family law and racial justice

ROBERT F. KENNEDY HUMAN RIGHTS **Washington, DC**
Summer Associate, Advocacy and Litigation Team May 2020 – July 2020
- Conducted legal research and prepared memoranda and briefs in support of litigation

SENATE JUDICIARY COMMITTEE, SEN. CHRIS COONS **Washington, DC**
Law Clerk January 2020 – April 2020
- Closely reviewed judicial opinions and briefs to draft questions for the record for judicial nominees

HUMAN RIGHTS FACT-FINDING PRACTICUM, GEORGETOWN LAW **Washington, DC**
Co-Investigator, Student August 2019 – April 2020
- Produced human rights report analyzing the Asylum Cooperative Agreement between the United States and Guatemala

HUMAN RIGHTS INSTITUTE, GEORGETOWN LAW **Washington, DC**
Research Assistant for Melissa Stewart July 2019 – April 2020
- Drafted memorandum on the status of the Rohingya refugee crisis in Myanmar and legal efforts against impunity
- Analyzed legal strategies of successful global LGBT rights campaigns

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR) **Kuala Lumpur, Malaysia**
Protection Unit Legal Intern June 2019 – August 2019
- Produced reports on the legal protection needs of refugees and asylum seekers and drafted memorandum analyzing UNHCR's compliance with international standards on privacy rights for asylum seekers

PUBLICATIONS

JACQUELINE LEWIS ET AL., DEAD ENDS: NO PATH TO PROTECTION FOR ASYLUM SEEKERS UNDER THE GUATEMALA ASYLUM COOPERATIVE AGREEMENT, (Hum. Rts. Inst. 2020).

Jacqueline Lewis, *The Executive's Power of the Purse in National Emergency: The President's Plan to Poach Defense Funds to Build the Wall*, 34 GEO. IMMGR. L. J 825 (2020).

Jacqueline Lewis
Georgetown University Law Center
Cumulative GPA: 3.36

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Kevin Arlyck	B+	4.00	
Constitutional Law I: The Federal System	John Mikhail	B+	3.00	
Legal Practice: Writing and Analysis	Erin Carroll	IP	2.00	Two semester course
Property	John Byrne	B	4.00	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts	Michael Diamond	A-	4.00	
Criminal Justice	Shon Hopwood	B+	4.00	
International Law: National Security and Human Rights	Milton Regan	B	3.00	
Legal Practice: Writing and Analysis	Erin Carroll	B+	4.00	
Torts	Gary Peller	B	4.00	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law	Paul Butler	A	3.00	
Evidence	Michael Gottesman	B	4.00	
Foreign Relations Law	Mark Feldman	B+	2.00	
Human Rights Fact-Finding	Kacey-Ann Mordecai	A	3.00	
Nuclear Non-Proliferation Law and Policy	Newell Highsmith	A-	2.00	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Sheryll Cashin	P	3.00	Mandatory Pass/Fail
Constitutional Law II: Individual Rights and Liberties	Jeffrey Shulman	P	4.00	Mandatory Pass/Fail
Externship Fieldwork	Sandeep Prasanna	P	3.00	Mandatory Pass/Fail
Externship Seminar	Sandeep Prasanna	P	1.00	Mandatory Pass/Fail
Externship Seminar I	Sandeep Prasanna	NG	0.00	Ungraded
Human Rights Fact-Finding	Kacey-Ann Mordecai	P	4.00	Mandatory Pass/Fail

Georgetown Law adopted a policy of mandatory pass/fail due to COVID-19.

August 23, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend Jacqueline Lewis as a law clerk. I recommend her highly and without qualification.

“Jackie” was a student in my Administrative Law class in the spring of 2020. In a medium-sized class of 47 students, I got to know her. She was an eager participant in class discussion and was always quite thoughtful in her remarks. She was genuinely interested in the course and excited to relate it to the work she was doing as a Senate legal intern and as a human rights investigator for asylum seekers.

As a result of the Covid-19 pandemic, Georgetown Law adopted mandatory pass/fail grading for the semester and of course Jackie passed. While I am not at liberty to say what letter grade I would have given her, the final exam she turned in was excellent, among the best in the class. She wrote two thoughtful, well-organized essays that made dense use of the course materials and cases and offered sophisticated analysis. For example she defended the constitutionality of the modern administrative state by pointing out the textual ambiguities in the Constitution, including its silence about agencies, and argued that this ambiguity was intentional, borne of the founding compromise between federalists and anti-federalists. She cited many cases to show that, despite their broad power, administrative agencies are regularly checked by courts or the President, consistent with the framer’s vision for separate powers and checks and balances. In her second essay she bravely challenged the Supreme Court’s standing doctrine, critiquing it not in terms of the rights of individual litigants but as an unacceptable encroachment on Congress’ authority to allocate enforcement power to citizens. In sum, she demonstrated mastery of relevant doctrine and modes of legal argument and I considered her among the top of a very bright class.

As Jackie’s transcript attests, she has been on an upward trajectory, her G.P.A. rising from a 3.21 in her first semester of law school to a 3.57 in the last semester for which she received grades. I have no doubt, based on her performance in my class, that had she received letter grades this spring she would have ascended even higher. Clearly she can produce excellent legal research and analysis, and especially excels in areas related to the domestic human rights and civil rights work she hopes to do in the future.

Jackie aspires to be a public interest litigator and ultimately work to shape public policy. As her resume attests, she has sought out an impressive array of work experiences in which to serve others and hone her legal research and advocacy skills. I believe that, with guidance and mentorship, she has the potential to make stellar contributions. In addition, she is very pleasant and will get along well with you and any co-clerks. In sum, having myself clerked on the U.S. Supreme Court and on the U.S. Court of Appeals for the D.C. Circuit, I believe Jackie will be an exceptional addition to your chambers.

If I can be of any further assistance, please do not hesitate to contact me by phone (202-365-5529) or by e-mail (cashins@georgetown.edu).

Sincerely,

Sheryll D. Cashin

August 23, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

It is a pleasure to write this letter of recommendation on behalf of Jacqueline ("Jackie") Lewis, who is applying for a judicial clerkship. Jackie was a student in my Constitutional Law II: Rights and Liberties course, and I have discussed at length with Jackie her professional goals. I am confident that Jackie is more than qualified to serve, and to serve with distinction, as a judicial clerk.

A word about this particular Con Law II course: In addition to taking the customary end-of-semester exam, my students are required to write a 15-page case comment. This assignment requires students to discuss a key case by positioning it within a line of doctrinal development, reviewing both the precedents that lead to the case as well as the case's jurisprudential legacy; students must also provide a critique of the case and the relevant doctrine. Students confer with me throughout the semester to discuss their Case Comment topic, outline, and draft(s). I point this out only to stress how well I get to know my students—and their written work.
Jackie chose to write on Zelman v. Simmons Harris, 536 U.S. 639 (2002). Following a clear presentation of the Supreme Court's Establishment Clause jurisprudence, with a focus on governmental funding of parochial schools, Jackie undertook a thoughtful analysis of the vouchers question. She argued that "neutrality and private choice alone . . . fail to protect the interests enshrined in the Establishment Clause, eroding the 'wall of separation' between church and state." Jackie was particularly concerned with the impact of vouchers on LGBT students and students of minority faiths. Let me quote her directly:
Supporters of voucher programs champion them as bastions of educational choice, claiming that they provide students in failing school districts the opportunity to receive a higher quality education. But this is not the case for all students. Instead, voucher programs often fail to provide real choice to their most vulnerable students, ultimately depriving them of the ability to seek the educational opportunities granted to their peers.
Jackie's point is clearly a significant one, and I hope that she has the opportunity to pursue it further.

Working with Jackie on this project, I found her to be entirely receptive to my feedback as the paper proceeded from outline to final product. Jackie is a responsive communicator, by which I mean she listens—actually listens!—to the viewpoints of her peers; she displays a true willingness to consider new ideas (and to reconsider old ones); and she looks for productive solutions to longstanding, if not intractable, doctrinal and social problems. Jackie is as personable as she is professional, and I have no that doubt that she will thrive in the close quarters of judicial chambers.
On both professional and personal grounds, then, I am pleased to recommend Jacqueline Lewis for a judicial clerkship, and I do so enthusiastically.

Thank you.
Sincerely,
Jeffrey Shulman

Jeffrey Shulman - shulmanj@law.georgetown.edu

August 23, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to express my strong support for Jacqueline Lewis's application to serve as a clerk in your chambers. Jacqueline has worked as my research assistant since the summer of 2019 and was a student the Human Rights Institute's Fact-Finding Practicum, which I co-teach. I highly recommend her for this clerkship.

I have worked closely with Jacqueline in my capacity as the Dash-Muse Teaching Fellow at Georgetown Law's Human Rights Institute. Jacqueline started working for me during the summer of 2019 as a research assistant. What was immediately apparent to me was the thoughtfulness and thoroughness of her research and work. She worked approximately 15-20 hours a week while also working as a Protection Unit Legal Intern for the United Nations High Commissioner for Refugees (UNHCR) in Kuala Lumpur, Malaysia. She was indefatigable in her approach to her work, juggling two challenging work assignments simultaneously. Her work product was flawless, showing a careful attention to detail and providing exactly what was requested of her.

I also had the pleasure of supervising Jacqueline in the Human Rights Fact-Finding Practicum. The course is a yearlong experiential course that demands much of its students for very little credit. The focus of our research was one that Jacqueline designed and advocated for, and was a highly impactful topic. We researched the implementation of the Asylum Cooperative Agreement between the United States and Guatemala. In January, when we were conducting field research, we were there the same week as the ACLU and the Washington Post, validating the importance of our work and the need for coordinated research and advocacy. Jacqueline played a central role in ensuring our focus on this critical issue.

What was most impressive to me during the course was the way in which Jacqueline demonstrated a mastery of the legal and factual matters at issue in the research. She was often the student that most clearly understood and explained the nuance of the issues we were addressing, and could articulate the importance key points in ways that outpaced her peers. Even among other talented Georgetown students, she stood out.

The legal skills she demonstrated during the Fact-Finding Practicum was just one of the reasons she was selected as a Pinto Summer Associate at Robert F. Kennedy Human Rights. This competitive summer position is reserved for the top two human rights students at Georgetown. She is certainly deserving of this honor.

Finally, I would like to note that in addition to being an exceptional student, Jacqueline is a kind person with the highest moral character. While working on the Senate Judiciary Committee, she carefully protected her ethical obligations and duty of confidentiality, even in matters that might be related to our research. This is what is expected of all lawyers, but worth noting as these ethical standards are critically important when serving members of our judiciary.

Jacqueline has been a joy to work with over the past year. She will be an asset to your team just as she has been to me as my research assistant and as a student in my class.

I am happy to discuss Jacqueline further if helpful. I cannot recommend her highly enough.

Sincerely,

Melissa Stewart
Dash-Muse Teaching Fellow
Adjunct Professor of Law
Georgetown Law
Human Rights Institute

COVER NOTE:

This piece was written for the Georgetown Immigration Law Journal's Current Developments Section, which publishes short pieces on current topics in immigration. Please note that this article was sent to publication prior to the recent Ninth Circuit Decision in Sierra Club v. Trump.

This work was edited by the author and the editors of the Georgetown Immigration Law Journal.

THE EXECUTIVE'S POWER OF THE PURSE IN NATIONAL EMERGENCY: THE PRESIDENT'S PLAN TO POACH DEFENSE FUNDS TO BUILD THE WALL

JACQUELINE LEWIS[*]

President Donald Trump made the promise to "build a wall" between the United States and Mexico a staple of his 2016 presidential campaign.[1] And since his election, a key part of the Trump administration's executive agenda has been to fulfill that promise.[2] But after failing to receive the desired funding for the wall's construction, the President now seeks to proceed "with or without Congress."[3] Usurping congressional authority, the President has declared the situation at the southern border a "national emergency" that "requires the use of the Armed Forces,"[4] triggering statutory emergency powers that allow him to redirect defense funds for "military construction" to use for construction of the wall.[5] In doing so, Trump has abused his executive authority to further his policy goals and poached Congress's power of the purse. A citizen coalition has since challenged President Trump's reprogramming plan, but the Supreme Court will allow it to go into effect, pending appeal.[6]

This article will detail the President's plan to redirect congressional appropriations toward the construction of the border wall, discuss one case challenging the President's actions, and analyze the issues animating the courts' decisions and the significance of their pending appeals.

Since his inauguration in 2017, the President has repeatedly requested appropriations from Congress for border wall construction to fulfill one of his central campaign promises.[7] For

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[*] Jacqueline Lewis, J.D. Candidate, 2021, Georgetown University Law Center; B.A. Political Science, *summa cum laude*, 2018, Biola University.

[1] *See, e.g.*, Ron Nixon & Linda Qiu, *Trump's Evolving Words on the Wall*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html.

[2] *See The Trump Administration's Immigration Agenda Protects American Workers, Taxpayers, And Sovereignty*, WHITE HOUSE (Feb. 4, 2020), https://www.whitehouse.gov/briefings-statements/trump-administrations-immigration-agenda-protects-american-workers-taxpayers-sovereignty/ (stating that "The border wall is being built as promised—with more than 100 miles of wall constructed and much more to come");
see also Fact Sheet: President Donald J. Trump's Border Security Victory, WHITE HOUSE (Feb. 15, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/ (stating that "President Trump was elected partly on his promise to secure the Southern Border with a barrier and, since his first day in office, he has been following through on that promise").

[3] *See* Andrew O'Reilly, *Mulvaney Says Border Wall Will Get Built, 'With or Without' Funding from Congress*, FOXNEWS.COM (Feb. 10, 2019), https://www.foxnews.com/politics/mulvaney-says-border-wall-will-get-built-with-or-without-funding-from-congress.

[4] Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).

[5] 10 U.S.C. § 2808 (2017).

[6] *See* Trump v. Sierra Club, 140 S. Ct. 1 (Mem.), 204 L.Ed.2d 1170 (2019).

[7] *See, e.g.*, OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT: A NEW FOUNDATION FOR AMERICAN GREATNESS: FISCAL YEAR 2018 (2017), https://www.whitehouse.gov/wp-content/uploads/2017/11/budget.pdf [hereinafter OFFICE OF MGMT. & BUDGET] (requesting "$2.6 billion in high-priority tactical infrastructure and

the 2019 fiscal year, President Trump requested "$1.6 billion to construct approximately 65 miles of border wall,"[8] although he informally "pressed Republicans to give him $5 billion as a down payment on his wall."[9] At first, the Senate appropriated the initial requested amount of $1.6 billion to be "made available" for border fencing.[10] However, in appropriations negotiations between the President and congressional Democratic leaders, the President again pushed Congress to appropriate $5 billion for a border barrier—and the talks broke down.[11] When the President did not receive the $5 billion, Congress and the President reached an impasse—one that led to the longest government shutdown in history.[12] Breaking the funding freeze, Congress then passed the Consolidated Appropriations Act, 2019, which appropriated $1.375 billion for construction of fencing in the Rio Grande Valley area of the border.[13] On February 15, President Trump signed the Act into law,[14] but expressed that he planned to acquire additional funding for the wall by declaring a national emergency.[15]

That same day, President Trump issued Proclamation 9844, "Declaring a National Emergency Concerning the Southern Border of the United States."[16] The Proclamation stated that increasing unlawful migration presents a border security and humanitarian crisis that constitutes a national emergency.[17] It reasoned that, not only does the southern border act as a major entry point for illicit activity, but the sharp rise in family unit migration in recent years has also led to an inability of the government to provide adequate space in detention, ensure individual's appearances at hearings, and enforce removal orders.[18] The Proclamation then declared that it would be necessary for the Armed Forces to provide additional support to traditional immigration enforcement due to the gravity of the crisis.[19]

In accordance with the National Emergencies Act,[20] which requires the President to specify the provisions of law under which he plans to act upon following the declaration of a national emergency,[21] the President then invoked section 2808 of title 10 of the U.S. Code as

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border security technology, including funding to plan, design, and construct a physical wall along the southern border").

[8] OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2019: EFFICIENT, EFFECTIVE, ACCOUNTABLE: AN AMERICAN BUDGET 57 (2018), https://www.whitehouse.gov/wp-content/uploads/2018/02/budget-fy2019.pdf.

[9] Rachel Bade, *Immigration Storm Bears Down on Republicans*, POLITICO (Jul. 2, 2018), https://www.politico.com/story/2018/07/02/immigration-republicans-border-fallout-687895.

[10] S. 3109, 115th Cong., tit. 2 (as reported by S. Comm. on Appropriations, June 21, 2018).

[11] Aaron Blake, *Trump's Extraordinary Oval Office Squabble with Chuck Schumer and Nancy Pelosi, Annotated*, WASH. POST (Dec. 11, 2018), https://www.washingtonpost.com/politics/2018/12/11/trumps-extraordinary-oval-office-squabble-with-chuck-schumer-nancy-pelosi-annotated/?noredirect=on.

[12] Mihir Zaveri et al., *The Government Shutdown was the Longest Ever. Here's the History*, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html.

[13] Consolidated Appropriations Act, 2019, Pub L. No. 116-6, § 229, 133 Stat. 13 (2019).

[14] *See Statement by the President*, WHITE HOUSE (Feb. 15, 2019), https://www.whitehouse.gov/briefings-statements/statement-by-the-president-28/.

[15] *Fact Sheet: President Donald J. Trump's Border Security Victory*, WHITE HOUSE (Feb. 15, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/.

[16] Proclamation No. 9844, *supra* note 4.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] National Emergencies Act, 50 U.S.C. § 1631 (2018).

authority for the Department of Defense to support the government's response to the emergency at the southern border.[22] Under section 2808, when the President declares a national emergency, the Secretary of Defense may redirect unobligated military construction funds to other projects so long as (1) there is a national emergency "that requires the use of the armed forces," (2) the funding is spent on a "military construction project," and (3) the project is "necessary to support [the] use of the armed forces."[23]

The President also stated his intent to divert $2.5 billion to the Department of Defense's drug interdiction fund, relying on section 284, which authorizes the Secretary of Defense to support other federal agencies for the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States."[24] The President also planned to augment the drug interdiction fund under section 8005, which authorizes the reprogramming of up to $4 billion.

Under section 8005, the transfer must come from either Department of Defense working capital funds or "funds made available in this Act . . . for military functions (except military construction)." Additionally, they must be determined by the Secretary of Defense as necessary to the national interest, reprogramed for higher priority items than those originally appropriated and based on "unforeseen military requirements." Finally, they may not be transferred in any case where Congress has denied the item for which funds are requested.[25]

On February 19, 2019, the Sierra Club and a coalition of other citizen groups filed suit requesting a preliminary injunction in the Northern District of California to prevent the redirection of federal defense funds for the construction of the wall.[26] The court granted their motion for a preliminary injunction on the use of the funds under section 8005, but not under section 2808.[27] Although the court determined that the plaintiffs were likely to succeed on the merits of both claims, it ruled that the citizen groups failed to prove the section 2808 requirement that they show irreparable harm would occur in the absence of an injunction.[28] The court reasoned that the plaintiffs could not demonstrate this requirement because the Administration had not yet determined how section 2808 funds would be used.[29] Instead, the court held that it would allow the plaintiffs to make a showing once the administration reported how the funds would be used.[30] The Ninth Circuit denied the Administration's appeal for a stay.[31]

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[22] Proclamation No. 9844, *supra* note 4.
[23] 10 U.S.C. § 2808 (2020).
[24] *See Fact Sheet: The Funds Available to Address the National Emergency at Our Border*, WHITE HOUSE (Feb. 26, 2019), https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency- [hereinafter Fact Sheet]; 10 U.S.C. § 284(b)(7) (2018).
[25] Dep't of Def. Appropriations Act, 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018).
[26] Sierra Club v. Trump, 379 F. Supp. 3d 883, 891 (N.D. Cal. 2019).
[27] *Id.* at 919.
[28] *Id.* at 926.
[29] *Id.* On September 3, 2019, the Secretary of Defense notified the court that he would authorize eleven border barrier projects in California, Arizona, New Mexico, and Texas pursuant to Section 2808. Ex. 2, Notice of Decision by the Department of Defense to Authorize Border Barrier Projects Pursuant to 10 U.S.C. § 2808, Sierra Club v. Trump, No. 4:19-cv-00892-HSG (N.D. Cal. 2019), https://www.aclu.org/legal-document/sierra-club-v-trump-dod-decision-authorize-border-barrier-projects-pursuant-10-usc-ss.
[30] *Sierra Club*, 379 F. Supp. 3d at 926–27.
[31] Sierra Club v. Trump, 929 F.3d 670, 707 (9th Cir. 2019).

However, in a short memo on July 26, 2019, the Supreme Court granted the government's motion to stay, stating that the plaintiffs had "no cause of action to obtain review."[32] Although not explicit, some speculate that the Court believes that the plaintiffs lack standing to bring the case.[33] Justice Breyer concurred in part and dissented in part, stating that he would have allowed the government to take preparatory steps for construction, but not disburse funds or begin construction.[34] Now, the Court waits for a final determination in the Ninth Circuit and the government's inevitable petition for certiorari.

In determining whether the President may redirect federal funds, it is important to note that there is no such thing as "emergency powers."[35] For the President to justify the use of federal funds, even in emergency, his power must "stem from an act of Congress or from the Constitution itself."[36] However, this use of power is not supported by the constitutional or statutory provisions President Trump invoked when he announced his reprogramming scheme.[37] Rather, his reprogramming of federal funds circumscribes essential checks and balances of the American government by claiming emergency authority in the face of congressional refusal. The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[38] This clause grants to the legislature the "exclusive power over the federal purse," and is "one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'"[39] The Constitution makes clear that the appropriation of funds is a legislative, not executive power; nor is this power authorized by statute.[40] Not only does the President's plan fail the requirements of the provisions under sections 2808 and 8005 of title 10 of the U.S. Code that he claims provide statutory authorization, but it subverts Congress's explicit intent of these provisions.[41] The President's declaration of a national emergency and actions to usurp Congress's appropriations power pose serious concerns regarding unbounded executive power and the militarization of domestic policy. This violates the fundamental order of a finite government and may result in setting a precedent of an illimitable president who may act as both the executive and legislature.

Congress has attempted to rein in claimed "emergency powers" from the executive through statutes like the "National Emergency Act," and these types of checks are critical to the preservation of a free republic. As explained below, the President's reprogramming plans under sections 8005 and 2808 do not meet the requirements of the statutes invoked, and, in fact, contradict one another. Instead, he appears to act in direct opposition to the express will of

[32] Trump v. Sierra Club, 140 S. Ct. 1 (Mem.), 204 L.Ed.2d 1170 (2019).
[33] David Savage, *Supreme Court rules for Trump in border wall funding dispute*, L.A. TIMES (Jul. 26, 2019), https://www.latimes.com/politics/story/2019-07-26/supreme-court-trump-in-border-wall-funding-dispute.
[34] *Sierra Club*, 140 S. Ct. at 2 (Breyer, J., concurring).
[35] *See* Youngstown Sheet & Tube, Co. v. Sawyer, 343 U.S. 579 (1952).
[36] *Id.* at 585.
[37] *See* Proclamation No. 9844, *supra* note 4; Peter Baker, *Trump Plans National Emergency to Build Border Wall*, N.Y. TIMES (Feb. 14, 2019), https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html.
[38] U.S. Const. art. I, § 9, cl. 7.
[39] U.S. Dep't of the Navy v. FLRA, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (quoting The Federalist No. 51 (James Madison)).
[40] *See* U.S. Const. art. I, § 9, cl. 7.
[41] *See* Fact Sheet, *supra* note 24; 10 U.S.C. § 284(b)(7) (2020).

Congress, outside of his constitutionally delegated powers, and the Supreme Court must recognize its crucial role in reining in these types of *ultra vires* grabs at power.

The President's claims of statutory emergency powers fail the requirements of sections 8005 and 2808. Section 8005 reprogramming applies to the specified Department of Defense (DoD) funds determined by the Secretary of Defense as necessary to the national interest, for higher priority items than for those originally appropriated, "based on *unforeseen military requirements*, and *in no case* where the item's funding *has been denied by Congress*."[42] The construction of a barrier on the border of the United States and Mexico is not an *unforeseen military requirement* and has unequivocally been *denied by Congress*. As previously established, President Trump has insisted upon the construction of a border wall since his presidential campaign and has requested appropriations for it since the beginning of his presidency.[43] Even within the Emergency Declaration, the President notes that large-scale migration through the southern border is "long-standing."[44] Section 8005 also cannot be invoked to justify reprogramming of funds to the wall because these funds were denied by Congress. It is precisely the rejection of additional funds by Congress for the construction of the wall that led to the government shutdown.[45]

Section 2808 also does not support the President's reprogramming plan. Section 2808 requires that there (1) be a national emergency that requires the use of armed forces, (2) the funds be used for military construction, and (3) the project be necessary to support the use of the Armed Forces.[46] Notably, the President's claim under section 2808 contradicts the requirements of section 8005, which *excludes* the redirection of funds for military construction purposes.[47] First, despite the emergency declaration's language, the situation at the southern border does not require the use of the Armed Forces. The enforcement of domestic law at the border by the Armed Forces, as proposed by the President in the Emergency Declaration, is prohibited under the Posse Comitatus Act, which in short forbids the military from executing domestic law.[48] Building a border barrier also does not constitute military construction. "Military construction"[49] includes "any construction, development, conversion, or extension of any kind carried out with respect to a military installation," as defined by section 2801 of the statute.[50] A "military installation" is "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department."[51] Because the southern border does not resemble the statutory definition of a military installation, the construction of a barrier would not constitute "military construction." The construction of a border wall is also not "necessary to support the use of Armed Forces."[52] Not only does Customs and Border Protection (CBP) already act as the

[42] Dep't of Def. Appropriations Act, § 8005.
[43] *See, e.g.*, OFFICE OF MGMT. & BUDGET, *supra* note 7; Nixon & Qiu, *supra* note 1.
[44] Proclamation No. 9844, *supra* note 4.
[45] *See* Zaveri et al., *supra* note 12.
[46] 10 U.S.C. § 2808 (2020).
[47] *Compare* 10 U.S.C. § 2808, *with* Dep't of Def. Appropriations Act, § 8005.
[48] 18 U.S.C. § 1385 (1994).
[49] 10 U.S.C. § 2808 (2020).
[50] 10 U.S.C. § 2801 (2017).
[51] 10 U.S.C. § 2801(c)(4) (2017).
[52] 10 U.S.C. § 2808 (2020).

enforcement agency at the border for domestic law,[53] but the Armed Forces are restricted to only support roles such as surveillance and search and rescue[54] under Posse Comitatus—certainly not "necessary" for their support.[55]

Therefore, without statutory authority to construct the wall, the President acts *ultra vires*, and in defiance of the Constitution's delegation of executive and legislative powers. Moreover, the President did not seem to hide the fact that the necessity of his Emergency Declaration was dubious. The day he announced the Declaration, he stated in an interview, "I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster … And I think that I just want to get it done faster, that's all."[56] In 1976, Congress enacted the National Emergencies Act (hereinafter "NEA") "to insure that the exercise of national emergency authority is responsible, appropriate, and timely"— seemingly to restrict this type of fraudulent exploitation of executive deference.[57] The NEA allows the President to exercise emergency powers authorized by Congress after "specifically declar[ing] a national emergency," so long as the President specifies the power or authority under which he will act.[58] The Act also provided that Congress could pass a joint resolution to dissolve a presidential declaration of a national emergency, subject to presidential veto.[59] For the first time in history, Congress used this power to terminate President Trump's declaration of a national emergency, but this effort was ultimately vetoed by the President.[60] The President's bad faith emergency declaration attempts to avoid constitutional restrictions in order to defy Congress. In so doing, he subverts the basic purpose of the NEA and this crucial constitutional check of separation of powers.[61]

Although the Supreme Court's grant of a stay was not a total victory for the President, it does raise a concern that the Court might rule that the plaintiff coalition does not have standing to sue. Notably, other courts have held that the legislature may not sue either.[62] So the question is: if not the citizen coalition, and if not Congress itself, then who can challenge the President if he acts outside of his authority? For there to exist some limit to presidential power, the courts

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[53] *See* U.S. Customs & Border Protection, *About CBP*, https://www.cbp.gov/about (last visited Apr. 5, 2020) (stating its mission as "to safeguard America's borders").
[54] Brief of the U.S. House of Representatives as Amicus Curiae in Support of Plaintiff's Motion for a Preliminary Injunction at 15, Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019); Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (citing Jim Garamone, *DOD Officials Testify on Military Support to Southwest Border*, DEFENSE.GOV (Jan. 29, 2019), https://www.defense.gov/Explore/News/Article/Article/1743120/dod-officials-testify-on-military-support-to-southwest-border/).
[55] 18 U.S.C. § 1385 (2020).
[56] Steve Benen, *A quote Trump may come to regret: 'I didn't need to do this'*, MSNBC.COM (Feb. 15, 2019), http://www.msnbc.com/rachel-maddow-show/quote-trump-may-come-regret-i-didnt-need-do.
[57] Sierra Club, 379 F. Supp. 3d at 898 (quoting Comm. on Gov't Operations & the Special Comm. on Nat'l Emergencies & Delegated Emergency Powers, 94th Cong., 2d Sess., The National Emergencies Act (Public Law 94–412) (1976) Source Book: Legislative History, Texts, and Other Documents, at 1 (1976) ("NEA Source Book")).
[58] 50 U.S.C. § 1621 (2020).
[59] 50 U.S.C. § 1622 (2020).
[60] H.R.J. Res. 46, 116th Cong. (2019); *Vetoes by President Donald J. Trump*, U.S. SENATE, https://www.senate.gov/legislative/vetoes/TrumpDJ.htm (last visited Apr. 5, 2020).
[61] Brief of the Brennan Center for Justice in Support of the Plaintiff's Motion for a Preliminary Injunction at 1, Sierra Club v. Trump, 379 F. Supp. 3d 883 (N.D. Cal. 2019); U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8 (D.D.C. 2019).
[62] *Mnuchin*, 379 F. Supp. 3d 8.

must fulfill their duty as a co-equal branch of government to "say what the law is."[63] They must determine when a branch of government has exercised power beyond its granted authority—reining in tyranny through the cases and controversies before them. It should be of grave concern when the executive may not be challenged by the citizens, the Congress, nor the Court, as "with all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."[64]

[63] Marbury v. Madison, 5 U.S. 137, 177 (1803).
[64] Sierra Club v. Trump, 929 F.3d 670, 707 (9th Cir. 2019) (citing Youngstown, 343 U.S., 654-55 (Jackson, J., concurring)).

Applicant Details

First Name	**Alexander**
Middle Initial	**E**
Last Name	**Lloyd**
Citizenship Status	**U. S. Citizen**
Email Address	**ael2156@columbia.edu**
Address	**Address** Street **153 W 139th St., Apt. A33** City **New York** State/Territory **New York** Zip **10030** Country **United States**
Contact Phone Number	**9734628920**

Applicant Education

BA/BS From	**Sarah Lawrence College**
Date of BA/BS	**May 2012**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 20, 2019**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Journal of Transnational Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Mavroidis, Petros
pmavro@law.columbia.edu
212-854-0278
Dignam, Brett
bdigna@law.columbia.edu
212-854-6944
Meyerhoff, Gary
gary.meyerhoff@sla.ny.gov
646-787-6883

References

1. Professor Petros Mavroidis: 212-854-0067; pmavro@law.columbia.edu
2. Professor Brett Dignam: 212-854-6944; bdigna@law.columbia.edu
3. New York State Liquor Authority General Counsel Gary Meyerhoff: 212-961-8317; gary.meyerhoff@sla.ny.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ALEXANDER E. LLOYD
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The Honorable Elizabeth W. Hanes
United States District Court
Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, Virginia 23219

Dear Judge Hanes:

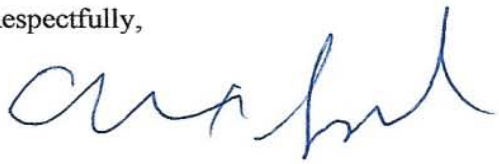
I write to apply for a clerkship in your chambers beginning in the late summer or fall of 2021. I am a New York State Excelsior Fellow currently working at the New York State Liquor Authority, a 2019 graduate of Columbia Law School, and a former online editor for the Columbia Journal of Transnational Law.

I am particularly interested in a clerkship with you because of my interests in trial and motion practice. My litigation interest grew out of my trial and motion practice coursework at Columbia, my experience in Columbia's Mass Incarceration Clinic representing a client in federal court, and my work at the New York State Liquor Authority, which has provided me with opportunities to try cases before administrative law judges, present summary suspension cases to the Board of Commissioners, and draft pleadings for appeals to the New York State Supreme Court. I believe that my work experience, my coursework, and my interests, have prepared me well, and will make me a great fit, for a clerkship in your chambers. On a more personal note, I am also looking forward to relocating to Virginia and being able to see my Virginia friends and family more often than once a year around the holidays.

Enclosed, please find a resume, transcript, writing sample, and letters of recommendation from Professor Petros Mavroidis (212-854-0067; pmavro@law.columbia.edu), Professor Brett Dignam (212-854-6944; bdigna@law.columbia.edu), and New York State Liquor Authority General Counsel Gary Meyerhoff (212-961-8317; gary.meyerhoff@sla.ny.gov).

Thank you for your consideration. Should you require any additional information, please do not hesitate to contact me.

Respectfully,



Alexander E. Lloyd

ALEXANDER E. LLOYD

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EDUCATION

Columbia Law School, New York, NY
Juris Doctor, May 2019
Honors: Harlan Fiske Stone Scholar (2017 – 2018)
Parker School Recognition of Achievement in International and Comparative Law
Activities: Columbia Journal of Transnational Law, Online Editor
Columbia Society of International Law, Membership Chair
Columbia Law School Class of 2019 Class Gift Committee, Committee Member

Sarah Lawrence College, Bronxville, NY
Bachelor of Arts, Economics Concentration, May 2012
Activities: Undergraduate Student Senate, Treasurer
WSLC Sarah Lawrence College Radio, Operations Manager

EXPERIENCE

New York State Liquor Authority, New York, NY
Excelsior Fellow, Counsel's Office September 2019 – Present
Investigating and prosecuting licensees for violations of the New York State Alcoholic Beverage Control Laws, including coordinating intra-agency and with New York City and State agencies and police on investigations, preparing and trying cases before administrative law judges, presenting summary suspensions to the Board of Commissioners, and negotiating settlements. Researching for and writing legal opinions and memoranda for agency attorneys and General Counsel. Drafting pleadings for Article 78 proceedings in New York State Supreme Court.

Morningside Heights Legal Services, New York, NY
Law Student Intern, Mass Incarceration Clinic January 2018 – May 2019
Litigated and settled a Federal Tort Claims Act and *Bivens* suit on behalf of an incarcerated client who was paroled during the litigation. Interviewed our client in federal prison, developed legal strategies, and consulted with medical experts. Wrote memoranda, interrogatories, and document requests with a student partner. Deposed a defendant. Drafted a settlement letter, counseled our client on comparables, and participated in a settlement conference.

Internal Revenue Service, Office of Chief Counsel, New York, NY
Summer Honors Intern, Large Business & International Division May 2018 – July 2018
Conducted legal research, including reviewing the Internal Revenue Code, Treasury Regulations, legislative history, Chief Counsel Memoranda, and Chief Counsel Advice. Wrote pre-action memoranda on intangible asset and contract valuations and constructive dividends, reviewed legal opinions, and assisted with settlement preparations.

United Nations, Office of Internal Oversight Services, New York, NY
Summer Intern, Investigations Division May 2017 – July 2017
Investigated allegations of employee benefits fraud, corruption, and professional misconduct by United Nations personnel and implementing partners, including authoring investigation and closure reports, reviewing investigation reports for factual and procedural correctness, reviewing evidence, and assisting with and conducting interviews.

Szaferman Lakind Blumstein & Blader, PC, Lawrence Township, NJ
Accounting Assistant May 2014 – July 2016
Managed trust accounts, executed wire transfers, and dispersed client settlements. Calculated settlement expenses for month-end pro forma balance sheets, resolved non-billables, and calculated cash flow. Produced invoices, processed payments, and advised on payment plans. Negotiated bank account fees and implemented paperless filing.

Paralegal September 2013 – April 2014
Produced Electronically Stored Information for Employee Retirement Income Security Act and Investment Company Act class actions. Analyzed and compiled documents for forensic economists. Researched using Case Logistix and the SEC EDGAR database. Prepared exhibits for depositions and attended depositions as support staff.

Alexander Lloyd
Columbia University School of Law

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
L6113 - Legal Methods	Peter Strauss	CR	3.00	
L6116 - Property	Michael Heller	B	4.00	
L6101 - Civil Procedure	Philip Genty	B	4.00	
L6115 - Legal Practice Workshop I	James Dillon & Deborah Heller	P	1.00	
L6105 - Contracts	Elizabeth Emens	B	4.00	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
L6679 - Foundation Year Moot Court	Andrew Amend	CR	0.00	
L6121 - Legal Practice Workshop II	Andrew Amend	P	1.00	
L6108 - Criminal Law	Elizabeth Scott	B	3.00	
L6118 - Torts	Bert Huang	B	4.00	
L6473 - Labor Law	Mark Barenberg	A-	4.00	
L6133 - Constitutional Law	Cristina Rodriguez	B-	4.00	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
L6552 - International Commercial Arbitration	George Bermann	B	3.00	
L6231 - Corporations	Justin McCrary	B+	4.00	
L6204 - Administrative Law	Gillian Metzger	B	4.00	
L6683 - Supervised Research	Petros Mavroidis	A	3.00	Journal Note Credit
L6640 - Journal of Transnational Law		CR	0.00	Journal Staff Position
L6675 - Major Writing Credit	Petros Mavroidis	CR	0.00	Journal Note Credit

Harlan Fiske Stone Scholar

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
L9225 - Seminar-Complex Litigation	Elizabeth Cabraser & Daniel Karon	A-	2.00	
L9256 - Mass Incarceration Clinic Project	Brett Dignam	CR	4.00	
L6640 - Journal of Transnational Law		CR	0.00	Journal Staff Position
L6347 - Capital Market Regulation	Merritt Fox & Lawrence Glosten	B+	3.00	

L9164 - Seminar-Labor Rights in a Global Economy	Mark Barenberg	A-	3.00	
L9256 - Mass Incarceration Clinic	Brett Dignam & Candice Nguyen	A-	3.00	

Harlan Fiske Stone Scholar

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
L6488 - Law of the W.T.O.	Petros Mavroidis	A-	3.00	
L9613 - Seminar-Advanced Federal Prison Litigation	Brett Dignam	CR	1.00	
L6640 - Journal of Transnational Law Editorial Board		CR	1.00	Journal Editorial Board Position
L6293 - Antitrust and Trade Regulation	Timothy Wu	B	3.00	
L8346 - Seminar-International Trade Regulation Issues	Merit Janow & Petros Mavroidis	A	2.00	
L6241 - Evidence	Paul Shechtman	B	3.00	
L6205 - Financial Statement Analysis and Interpretation	Norman Bartczak	A-	3.00	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
L9175 - Seminar-Trial Practice	Elizabeth Lederer	B+	2.00	
L6274 - Professional Responsibility	Kathy Rose	B+	2.00	
L6640 - Journal of Transnational Law Editorial Board		CR	1.00	Journal Editorial Board Position
L6256 - Federal Income Taxation	Michael Graetz	B+	4.00	
L9509 - Seminar-Antitrust in Action	Christine Varney & David Marriott	B+	2.00	
L6425 - Federal Courts	Kellen Funk	B	4.00	

Parker School Recognition of Achievement in International and Comparative Law

Grading System Description

A through C [plus (+) and minus (-) with A and B only], CR (credit - equivalent to passing), F (failing). Some offerings are graded by HP (high pass), P (pass), LP (low pass), F (failing).

Alexander Lloyd
Sarah Lawrence College

2008-2009 Academic Year

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
HIST 3708 R - Winds of Doctrine: Europe in the Age of Reformation	Philip Swoboda	B	10.0	
LITR 1033 F - Imagination on the Move: Exploring Travel in Literature	Una Chung	B+	10.0	
MATH 3700 R - Calculus and Differential Equations	Joseph Woolfson	B	10.0	

Fall 2009

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
WRIT 3241 R - Fiction Workshop	Scott Snyder	B+	5.00	
HIST 2023 L - Russia and Its Neighbors: From the Mongol Era to Lenin	Philip Swoboda	B+	5.00	
ECON 3853 R - History of Economic Thought	Marilyn Power	A-	5.00	

Spring 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
ECON 3853 R - History of Economic Thought	Marilyn Power	A-	5.00	
ARTH 2025 L - Beauty, Bridges, Boxes, Blobs: "Modern" Architecture from 1750 to Present	Joseph Forte	AU	0.00	Audit
HIST 2028 L - Russia and Its Neighbors: From Lenin to Putin	Philip Swoboda	B	5.00	
WRIT 3253 R - Fiction Workshop	Nelly Reifler	B+	5.00	

2009-2010 Summer Session

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
ECON 6900 I - Microeconomics, Post-Keynesianism, and the Financial Crisis	Marilyn Power	A	2.00	Independent Study

Fall 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

MATH 2024 L - An Introduction to Statistical Methods and Analysis	Daniel King	A-	2.50	
HIST 2015 L - Europe since 1945	Jefferson Adams	B+	2.50	
POLI 3252 R - Contemporary African Politics	Elke Zuern	A-	5.00	
ECON 3760 R - Macroeconomic Theory and Policy	Marilyn Power	A	5.00	

Spring 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
ECON 2010 L - Introduction to Economic Theory and Policy	Marilyn Power	AU	0.00	Audit
ECON 3596 R - Topics in Marxian and Post Keynesian Economics	Jamee Moudud	A	5.00	
PHYS 3144 R - Physics for Future Presidents	Kanwal Singh	B+	5.00	
MATH 2014 L - Game Theory: The Study of Strategy and Conflict	Daniel King	B+	5.00	

Fall 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
HIST 3131 R - The Cold War in History and Film	Jefferson Adams	B+	5.00	
ECON 3559 R - Money and Financial Instability: Theory, History, and Policy	Jamee Moudud	A	5.00	
VISU 3335 A - Architecture Studio: Designing Built Form	Tishan Hsu	B+	5.00	
MATH 3051 R - Geometry	Joseph Woolfson	AU	0.00	Audit

Spring 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
POLI 3755 R - Collective Violence & Post-Conflict Reconciliation	Elke Zuern	A-	5.00	
MATH 6003 C - Introduction to Multivariable Calculus	Joseph Woolfson	A	5.00	Conference Course
ECON 2034 L - Social Metrics: Introduction to Statistical Measurement and Structural Analysis in the Social Sciences	Jamee Moudud	A+	5.00	

August 22, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am happy to provide my strongest recommendation in support of Alexander Lloyd's application for a clerkship position in your chambers at the United States Court of International Trade. I first met Alex in 2017 when he wrote his major writing assignment under my direction. He also took both a lecture on the World Trade Organization and a seminar on international trade issues with me and performed well in both. He is one of the best students I have had in several years and I believe he is highly qualified for a clerkship position in your chambers.

Alex showed himself an incredibly smart and thoughtful student, who is both talented and hard-working. His abilities were obvious in class as he consistently found original points to analyze and dissect with deft skill, always meeting my highest expectations with his excellent work and raising the intellectual level of our conversations. I was particularly impressed by his writing assignment—a journal note submission written for Columbia's leading journal for international law, the Columbia Journal of Transnational Law. His research abilities were obvious during our numerous discussions as he carefully considered a variety of ideas before contributing original and insightful points. Further-more, his concise final product piqued my intellectual curiosity with its well-considered observations and arguments. I am certain that he has everything needed to take full advantage of a position that relies on his research and writing ability.

I have every confidence that Alex would make excellent use of a clerkship opportunity. He has an excellent and hungry mind, which makes me believe he will provide a great deal for any judge with whom he works. I believe he will have an exceptional future and will go far in the legal world.

Please do not hesitate to contact me with any questions at pmavro@law.columbia.edu.

Sincerely,

Petros C. Mavroidis
Edwin B. Parker Professor of Foreign and Comparative Law

Columbia
Law School

Brett Dignam
Vice Dean of Experiential Education
and Clinical Professor of Law

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Re: Recommendation for Alexander E. Lloyd

Dear Judge:

I write to recommend Alexander ("Alex") Lloyd for a clerkship in your chambers. I know Alex well, having closely supervised Alex in the context of his work as a clinical student, both in a classroom setting and representing clients. In the clinic, he assumed major responsibility for conducting comprehensive discovery and taking a deposition in a civil rights case brought under 42 U.S.C. §1983. His commitment, diligence, and close attention to detail make him a strong clerkship candidate. Dogged research and cogent writing are hallmarks of his work. He is a valued colleague who has a gentle approach to collaboration.

Alex enrolled in the Challenging the Consequences of Mass Incarceration Clinic during his second year in law school. Although he was candid about the fact that he was not terribly sympathetic to our client population, he was looking for litigation experience and he threw himself into the work. He was assigned to a federal civil rights case filed by a detainee at the Metropolitan Detention Center, and pending in the Eastern District of New York. Appointed by the court, we represent the plaintiff as pro bono counsel as we litigate his claims of unconstitutional and negligent medical care. Alex's first event in court was a status conference two weeks into the semester that was conducted by the students who had handled the case the previous semester and who had shepherded the amended complaint through filing. Judge Lois Bloom set a discovery schedule that Alex and his clinic partner implemented. Within weeks, the team had mastered hundreds of pages of medical records, learned the nuances of wound care and bone infection, created valuable secondary work product and charted out a series of depositions.

Inevitable negotiation with opposing counsel over document requests and interrogatories delayed depositions until the summer. Throughout this process, Alex was patient and persistent, examining every response and considering whether there was a middle ground that would get us what we needed and advance the case. Although Alex was working at the IRS, he readily agreed to continue working through the summer at night and during the weekends. He took the first deposition in the case in June and the professionalism he exhibited made it difficult to believe that it was his first. He understood the importance of establishing a relationship with the witness, who knew much more about the facts than we did at that time. Although she was not the sympathetic nurse that our client remembered, Alex was able to elicit helpful testimony that clarified our path forward.

Alex has an organized and comprehensive approach to legal work. He is willing to put in the time, examine the procedural details and march ahead. His writing is clear and direct. He and his clinic partner spent scores of hours, side by side in the clinic work space, debating language and strategy.

Although they have very different approaches to work, it was one of the most successful teams I have supervised in many years of teaching.

I am confident that he would commit himself entirely to every case and project. He has enjoyed his Excelsior Fellowship and confirmed that he enjoys the intensity and rigor of litigation. He would relish the opportunity to roll up his sleeves and get to work.

Please do not hesitate to call me if you have questions about this letter or about Alex's work in the clinic. I can be reached at (212) 854-6944.

Sincerely,

Brett Dignam
Vice Dean of Experiential Education and Clinical Professor of Law

August 31, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am the General Counsel of the New York State Liquor Authority ("SLA"). I write to recommend Alexander Lloyd, who currently works for me as a prosecutor, for a clerkship.

Alex is one of fifteen prosecutors statewide who is responsible for reviewing complaints and referrals from law enforcement, considering whether to bring charges for violations of the Alcoholic Beverage Control law, preparing pleadings, negotiating with opposing counsel, and trying the charges before an Administrative Law Judge. Our lawyers also defend decisions of the SLA in Article 78 proceedings brought in New York State Courts.

Alex just began his fellowship when I arrived at the SLA in October 2019 (after 20 years as a litigation partner at Dentons US LLP and its predecessor firms). Still less than a year out of law school, Alex functions independently as a complete prosecutor. He is already trying cases before ALJs.

Most recently, Alex joined the SLA team that is working on keeping New York safe from the COVID-19 virus. The SLA has been suspending the licenses of restaurants and bars that fail to follow the requirements of Governor Cuomo's Executive Orders on the service of food and alcohol during the pandemic. Such violations result in the congregating and mingling of patrons in ways that heighten the risk that the virus will spread. Alex routinely presents oral argument to the SLA's Full Board on why particular conduct has created a sufficient risk to the health, welfare and safety of the public to warrant an emergency summary suspension under the New York State Administrative Procedure Act. This is very important work and I did not hesitate to add Alex to our team, most of whom have many years of experience as prosecutors.

Alex is a bright, hard working, and resourceful lawyer already. He has a keen mind and a healthy skepticism about the way things are done in this office, and I have found myself relying on his thoughts and advice as I look for ways to improve the quality of our prosecutions.

Alex presents as reserved, but do not be mistaken: his mind is working hard at all times and he speaks up with vigor, and fearlessness, when appropriate.

I have seen hundreds of young litigators come and go, and Alex would have fit right in to the "Big Law" scene had he chosen it instead of doing a fellowship with the SLA. But by being at the SLA, he already has to have far more real world and hands-on experience than a first year litigation associate.

I have confidence in, and high hopes for, Alex as a member of our profession. Clerking is an excellent next step for him. I recommend Alex with vigor.

Sincerely,

Gary Meyerhoff
General Counsel
New York State Liquor Authority

Gary Meyerhoff - gary.meyerhoff@sla.ny.gov - 646-787-6883

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Writing Sample

The following writing sample is a revised version of a mock Class Certification Brief written as my final assignment for my Complex Litigation class during my 2L year at Columbia Law School. The revision was edited for length and content. The assignment was to write a Class Certification Brief based on a fictional situation that the professors provided to the class in a mock Class Action Complaint.

My mock Class Certification Brief addresses all of the issues necessary for a class to be certified under Federal Rule of Civil Procedure 23. First, it addresses the Rule 23 implied threshold. Second, it addresses each of four requirements under Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. Finally, it addresses the Rule 23(b)(3) requirements for class certification regarding factual and legal questions common to class members that predominate over all other factual and legal issues affecting individual class members.

INTRODUCTION

Defendant, Amazing.com, was entrusted with safeguarding Plaintiff's personal customer account information ("PCAI"). Class Action Complaint ("CAC") at ¶¶ 1–2. Defendant failed to take the proper precautions to protect its New York City servers and Plaintiff's PCAI. *Id.* at ¶¶ 1–2, 26. Defendant's failure to take the proper precautions affected every customer who had PCAI stored on Defendant's New York City servers, which includes over 12 million similarly situated customers ("the Class Members"). *Id.* at ¶ 1. Plaintiff submits this brief in support of its motion seeking class certification.

ARGUMENT

I. RULE 23 SHOULD BE CONSTRUED LIBERALLY TO GRANT CLASS CERTIFICATION

"'The Second Circuit has emphasized that Rule 23 should be given liberal … construction, and it seems … that the Second Circuit's general preference is for granting … class certification.'" *Gomez v. Lace Entertainment, Inc.*, 2017 U.S. Dist. LEXIS 5770, at *12–*13 citing *Espinoza v. 953 Associates LLC*, 280 F.R.D. 113, 2011 WL 5574895, at *6.

II. PLAINTIFF'S AND CLASS MEMBERS SATISFY THE RULE 23 THRESHOLD REQUIREMENTS FOR CLASS CERTIFICATION

A. Plaintiff's and Class Members Are Ascertainable Because the Classes Satisfy Objective Criteria and Are Readily Identifiable

A class is ascertainable if it is "'readily identifiable, such that the court can determine who is in the class and, thus, bound by the ruling.'" *Charrons v. Pinnacle Grp. NY LLC*, 269 F.R.D. 221, 229 (S.D.N.Y. 2010), citing *McBean v. City of N.Y.*, 260 F.R.D. 120, 132–33 (S.D.N.Y. 2009). The Second Circuit "standard for ascertainability is whether a class is defined 'using objective criteria that establish a membership with definite boundaries.' *In re Petrobras Secs.*, 862 F.3d 250, 264 (2d Cir. 2017)." *Royal Park Invs. SA v. Wells Fargo Bank, N.A.*, No. CV-09764 (KPF)(SN), 2018 U.S. Dist. LEXIS 9087, at *20 (S.D.N.Y. Jan. 10, 2018). "In *Petrobras*, the Court of Appeals explained that 'the

ascertainability analysis is limited to [the] narrower question' of whether class membership is 'objectively possible,' not whether it is practical or administratively feasible." *Id.* at *21.

Not all objective criteria meet the standard. "A class defined as 'those wearing blue shirts,' while objective, could hardly be called sufficiently definite and readily identifiable; it has no limitation on time or context, and the ever-changing composition of the membership would make determining the identity of those wearing blue shirts impossible." *Brecher v. Republic of Arg.*, 806 F.3d 22, 25 (2d Cir. 2015). To be ascertainable a class must be sufficiently definite, readily identifiable, and can be limited by time and context. In the instant case, Plaintiff and Class Members form a sufficiently definite list because all received Defendant's email notifying them of the breach. Second, Defendant created a list consisting of every affected customer when it sent out the email regarding the breach, thus all parties are identifiable. For the New York and California Classes, the lists of individuals are limited to those domiciled in New York and California, respectively. Third, the applicable time period is the date when Plaintiff's and Class Members' PCAI that was stored with Defendant was stolen or compromised. Fourth, Plaintiff and Class Members are limited by the context within which the injury was suffered.

B. Plaintiff and Class Members Satisfy the Class Membership and Live Controversy Requirements

"As a general rule, a class action cannot be maintained unless there is a named plaintiff with a live controversy both at the time the complaint is filed and at the time the class is certified." *Swan v. Stoneman*, 635 F.2d 97, 102 n.6 (2d Cir. 1980) citing *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). In the instant case, Plaintiff is a member of the Class and similarly situated to others in the Class. A live controversy also exists. Neither Plaintiff nor Class Members have recovered from the injuries sustained at the time of the breach caused by Defendant, and the controversy is still live.

III. PLAINTIFF'S AND CLASS MEMBERS SATISFY THE FOUR RULE 23(A) REQUIREMENTS

Fed. R. Civ. P. 23(a) sets forth the following four requirements for class certification:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are

> questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 504 F.3d 229, 244 (2d Cir. 2007) summarizes the requirements as: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.

A. All Three Classes Contain Millions of Class Members, Satisfying the Rule 23(A)(1) Numerosity Requirement

The Fed. R. Civ. P. 23(a)(1) numerosity requirement "does not mandate that joinder of all parties be impossible—only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate." *Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 244–245 (2d Cir. 2007). The Court in *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 83 (S.D.N.Y. 2007), citing *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995), stated that the "Second Circuit has observed that 'numerosity is presumed at a level of 40 members.'" The Nationwide, New York and California Classes, each contain millions of Class Members and satisfy the 40-member criterion.

B. Questions of Law and Fact as Well as Their Answers Are Common to Plaintiff and Class Members Satisfying the Rule 23(A)(2) Commonality Requirement

"What matters to class certification … is not the raising of common "questions"—even in droves—but, rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "'[P]laintiffs' grievances [must] share a common question of law or of fact.'" *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 84 (S.D.N.Y. 2007), citing *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). "Not every 'issue[] must be identical as to each [class] member, but . . . plaintiff [must] identify some unifying thread among the members' claims that warrants class treatment.'" *Id.* citing *Cutler v. Perales*, 128 F.R.D 39, 44 (S.D.N.Y. 1989).

In the instant case, the following facts are common to Plaintiff and all Class Members: (1) all

were Defendant's customers and provided Defendant with PCAI; (2) all received a data breach email from Defendant; (3) all have sustained damages because of Defendant's negligence; and (4) none has received any compensation. CAC, ¶¶ 9–23. The timeline of events, the context and the fact that all are common demonstrates a "unifying thread among the members' claims that warrants class treatment.'" *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 84 (S.D.N.Y 2007).

Second, the following questions of law are common to Plaintiff and all Class Members: (1) whether Defendant owed a duty to exercise reasonable care in protecting and securing Plaintiff's and Class Members' PCAI; (2) whether Defendant acted negligently by failing to properly safeguard Plaintiff's and Class Members' PCAI; (3) whether Defendant breached its duty; (4) whether Defendant's breach of its duty was the direct and proximate cause of Plaintiff's and Class Members' injuries; and (5) whether all suffered the same injury. These common issues of law demonstrate a "unifying thread among the Class Members' claims that warrants class treatment." *Id.* Using the *Wal-Mart* standard, the answer to each of the aforementioned questions of law for Plaintiff and for all Class Members is "yes."

C. Plaintiff's and Class Members' Claims Arise From the Same Events and Have the Same Legal Basis Satisfying the Rule 23 Typicality Requirement

The "typicality requirement is satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993). "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Id.* at 936–937.

The claims of Plaintiff and all Class Members arise from the same events: All received Defendant's March 11, 2018 email regarding the breach and Defendant's recommendations to reset account passwords. In addition, Plaintiff and all Class Members allege the same common law negligence. Plaintiff and all Class Members assert that: (1) Defendant had a duty to safeguard Plaintiff's

and Class Members' PCAI; (2) Defendant breached that duty by failing to take the proper precautions to secure its servers; (3) Defendant's failure was the direct and proximate cause of the data breach; and (4) that Plaintiff and each Class Member suffered the injury of having their PCAI stolen or compromised, their privacy invaded and the economic and noneconomic harm associated with resetting account passwords and obtaining identity theft insurance and credit monitoring services. This shows that Plaintiff and all Class Members assert the same legal arguments, and thus, are typical.

D. Plaintiff and Counsel Will Fairly and Adequately Protect the Classes' Interests Since Their Interests Are Aligned With Class Members' Interests, Satisfying the Rule 23(A)(4) Adequacy of Representation Requirement

"Adequacy of representation is evaluated in two ways; [(1)] by looking to the qualifications of Plaintiff's counsel and [(2)] by examining the interests of the named plaintiffs." *Charrons v. Pinnacle Grp. NY LLC*, 269 F.R.D. 221, 234 (S.D.N.Y. 2010) citing *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000). Plaintiff's Counsel "must be 'qualified, experienced and generally able' to conduct the litigation." *In re Drexel Burnham Lambert Grp.*, 960 F.2d 285, 291 (2d Cir. 1992). For the Nationwide and the New York Classes, Plaintiff's Counsel is well-acquainted with New York law and does not "lack the manpower [or] financial resources to prosecute this putative class action." *Bano v. Union Carbide Corp.*, No. 99 Civ. 11329, 2005 U.S. Dist. LEXIS 32595, at *28 (S.D.N.Y. Aug. 12, 2005). Additionally, as New York common law regarding negligence and California common law regarding negligence are identical, Plaintiff's Counsel is qualified.

Plaintiff's interests are fully aligned with those of the Class Members. Plaintiff has suffered injuries identical to all Class Members, was exposed to the same identity theft, and is also seeking identical remedies. Plaintiff's stolen or compromised PCAI was stored on the same servers as Class Members. Plaintiff and Class Members are in similar situations and there is no evidence that "the interests of the Named Plaintiffs are adverse to those of other class members." *Charrons v. Pinnacle Grp. NY LLC*, 269 F.R.D. 221, 235 (S.D.N.Y. 2010).

IV. PLAINTIFF AND CLASS MEMBERS SATISFY THE RULE 23(B)(3) REQUIREMENTS FOR CLASS CERTIFICATION

Fed. R. Civ. P. 23(b)(3) requires for class certification: "[(1)] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and [(2)] that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." "In adding [the] 'predominance' and 'superiority' … [requirements], the Advisory Committee sought to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote … uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997).

A. Factual Questions Common to Plaintiff and All Class Members Predominate Over Any Questions Affecting Plaintiff or Individual Class Members, Satisfying The Factual Predominance Prong of Rule 23(B)(3)

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). To determine predominance "courts 'must assess (1) the "elements of the claims and defenses to be litigated"; and (2) "whether generalized evidence could be offered to prove those elements on a class-wide basis or whether individualized proof will be needed to establish each class member's entitlement to relief."'" *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950 (AT) (RWL) 2018 U.S. Dist. LEXIS 54732, at *58 (S.D.N.Y. Mar. 30, 2018), citing *Johnson v. Nextel Communs. Inc.*, 780 F.3d 128, 138 (2d Cir. 2015).

In the instant case, the same generalized evidence can be provided by Plaintiff and all Class Members to prove each element of the claim on a class-wide basis. "To establish a prima facie case of negligence…, a plaintiff must demonstrate that the defendant owed him or her [(1)] a duty of reasonable care, [(2)] a breach of that duty, … [(4)] a resulting injury [and (3), that said injury was] proximately caused by the breach." Elmaliach v. Bank of China Ltd., 110 A.D.3d 192, 199 (App. Div. 2013). Here,

Defendant owed a duty of reasonable care to protect Plaintiff's and Class Members' PCAI. Defendant uniformly breached this duty as it failed to provide proper security features for its New York City servers. Third, the harm was directly and proximately caused by the breach of Defendant's duty, or the failure to provide proper security measures, which made it possible for hackers to breach the internal network and steal or compromise Plaintiff's and Class Members' PCAI. Fourth, the injury was uniform to Plaintiff and all Class Members, as all had their PCAI stolen or compromised during the breach, all were equally at risk of identity theft and all then needed to take similar steps to prevent their identities from being stolen, such as changing passwords, ordering new credit card and paying for a credit monitoring service or identity theft insurance. Those steps consume time and money that would have been used on spent in another manner had the breach not occurred.

B. Legal Questions Common to Plaintiff and All Class Members Predominate Over Any Questions Affecting Plaintiff and Individual Class Members, Satisfying the Legal Predominance Prong of Rule 23(B)(3)

1. A Nationwide Class utilizing New York negligence law should be certified under Phillips Petroleum Co. v. Shutts

The Supreme Court has stated that, when there is a nationwide class and a question as to the applicable state substantive law, it must be established (1) whether there is a conflict of laws, and if so, (2) which state's laws dominate. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). Here, there is no conflict because California's negligence laws are identical to New York's negligence laws. The elements for a negligence claim under California law include "[(1)] a legal duty to use due care, [(2)] a breach of such legal duty, and [(3)] the breach as the proximate or legal cause of [(4)] the resulting injury. *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal. 3d 586, 594 (1970). Twelve other states have common law negligence laws identical to New York and California.[1] Thus, the negligence

[1] The following cases provide examples of common law negligence identical to New York and California: Colorado, *see Lyons v. Nasby*, 770 P.2d 1250, 1254 (Colo. 1989); Connecticut, *see Considine v. City of Waterbury*, 905 A.2d 70, 89 (Conn. 2006); Florida, *see Clampitt v. Sales*, 786 So. 2d 570, 573 (Fla. 2001); Illinois, *see Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990); Massachusetts, *see Dinsky v. Framingham*, 386 Mass. 801, 804 (1982); Michigan, *see Romain v. Frankenmuth Mut. Ins. Co.*, 483 Mich. 18, 21–22 (2009); Missouri, *see Deuschle v. Jobe*, 30 S.W.3d 215, 218 (Mo. Ct. App. 2000); New Jersey, *see Weinberg v. Dinger*, 106 N.J. 469, 484 (1987); Ohio, *see Wallace v. Ohio DOC*, 96 Ohio St. 3d 266, 274 (2002);

laws that are to be used for the Nationwide Class, either New York, California, or most other applicable states would be equally satisfactory, and thus, there is no conflict of laws. Thus, Plaintiff and all Class Members have common legal questions that predominate over individual questions since Plaintiff and all Class Members can satisfy all elements of a claim, no matter which state's common law negligence is used.

However, were the Court to find a conflict of law, it then must determine which state's laws dominate. "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1111 (9th Cir. 2013) citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–313 (1981).

New York has a significant aggregation of contacts with this case including the domiciles of several Class Members, the location of the injury caused to Plaintiff and Class Members, the Defendant's place of incorporation, the location of the unprotected servers central to the dispute, and the state within which the breach occurred. Thus New York's significant aggregation of contacts supports its interest in applying its own law to a Nationwide Class under *Shutts*.

2. A California Class under California law should be certified in lieu of a Nationwide Class under New York law

Plaintiff filed this matter in New York based on diversity. Thus, New York's conflict of laws doctrine applies. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). "New York utilizes [an] interest analysis to determine which of two competing jurisdictions has the greater interest in having its law applied in the litigation." *Padula v. Lilarn Props. Corp.*, 84 N.Y.2d 519, 521 (1994). This analysis considers: "'(1) what are the significant contacts and in which jurisdiction are they located; and, (2)

Pennsylvania, *see Krentz v. CONRAIL*, 589 Pa. 576, 588 (2006); Texas, *see Greater Hous. Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); and Virginia, *see Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 132 (2000).

whether the purpose of the law [at issue] is to regulate conduct or allocate loss' (*Padula v. Lilarn Props. Corp.*, 84 N.Y.2d at 521)." *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 201 (App. Div. 2013). The "significant contacts in such an analysis are, 'almost exclusively, the parties' domiciles and the locus of the tort.'" *Id.*, citing *Padula v. Lilarn Props. Corp.*, 84 N.Y.2d at 521.

In addition, "when the conflict pertains to a conduct-regulating rule, the law of the place where the tort occurs will generally apply, with the locus of the tort generally defined as the place of the injury." *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 201 (App. Div. 2013). Finally, "[w]here a defendant's negligent conduct occurs in one jurisdiction and the plaintiff suffers injuries in another, 'the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred,' that is, 'where the Plaintiff's injuries occurred.'" *Id.* at 203, citing *Schultz v. Boy Scouts of Am.*, 65 N.Y.2d 189, 195 (1985).

Based upon these criteria, the California Class should be certified under California law because the Plaintiff and several Class Members are all domiciled in California and all suffered economic and noneconomic harm in California. Thus, with Plaintiff and Class Members domiciled in, and injuries sustained in, California, New York conflict of laws doctrine dictates California negligence law should apply, and a California Class should be certified.

3. A New York Class under New York law should be certified in lieu of a Nationwide Class under New York law.

The New York cases discussed above concerning conflict of laws doctrine specifically concerning negligence, namely *Padula*, *Elmaliach* and *Schultz* support the certification of a New York Class. All New York Class Members are domiciled in New York and the tort's locus concerning the New York Class Members is in New York. Thus, with Class Members domiciled in, and injuries sustained in, New York, New York conflict of laws doctrine dictates New York negligence law should apply and a New York Class should be certified.

C. The Class Action Is the Superior Method for Adjudicating This Case.

In addition to predominance, Rule 23(b)(3) requires "that a class action be superior to other methods of handling the litigation [and] … other available methods for fairly and efficiently adjudicating the controversy.'" *Katz v. Image Innovations Holdings, Inc.*, No. 06 Civ. 3707 (JGK), 2010 U.S. Dist. LEXIS 73929 at *17 (S.D.N.Y. July 21, 2010), citing *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 133 (S.D.N.Y. 2001). A class action is superior when "'[t]he potential class members are both significant in number and geographically dispersed,' and when '[t]he interest of the class as a whole in litigating the many common questions substantially outweighs any interests by any individual member in bringing and prosecuting separate actions.'" *Katz v. Image Innovations Holdings, Inc.*, No. 06 Civ. 3707 (JGK), 2010 U.S. Dist. LEXIS 73929 at *17 (S.D.N.Y. July 21, 2010). In the instant case, there are over 12 million geographically dispersed Class Members spread from New York to California.

To further establish superiority, (1) "the individual members of the Class [must] have relatively small damages," (2) "the cost of pursuing individual litigation to seek recovery is … not feasible" to the extent that no attorney would represent the Class Members individually and (3) there are "no other actions [currently] proceeding on behalf of similarly situated [customers] on an individual basis." *Id.* at *18. The current class action is the fairest and most efficient method available because it meets the *Katz* criteria. First, the damages per person for the loss of time and money due to changing passwords, replacing credit cards and payment for credit monitoring services will be relatively small. Second, the cost of pursuing individual litigation would be too great when compared to the small return of the aforementioned damages, and no attorney would be willing to pursue individual litigation. Third, there is no other litigation proceeding that would cause this litigation to be deemed unfair or inefficient. It is for those reasons that the superiority prong has been satisfied and these Classes should be certified.

CONCLUSION

For all of the foregoing reasons, the court should certify a Nationwide Class in this matter. In the alternative, the court should certify either a California or a New York Class.

Applicant Details

First Name	**Daniel**
Middle Initial	**P**
Last Name	**Lucca**
Citizenship Status	**U. S. Citizen**
Email Address	**luccada@bc.edu**
Address	**Address** Street **3725 Shadow Canyon Trail, 3** City **Broomfield** State/Territory **Colorado** Zip **80020** Country **United States**
Contact Phone Number	**7208418654**

Applicant Education

BA/BS From	**University of Colorado-Boulder**
Date of BA/BS	**May 2018**
JD/LLB From	**Boston College Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=12201&yr=2011**
Date of JD/LLB	**May 15, 2022**
Class Rank	**33%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

References

1. Roy Fredrikson – Former Supervisor/Deputy Counsel, Department of Veterans Affairs, Office of Inspector General
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2. Kari Hong – Former Boston College Law School Professor/Current Appellate Attorney at the Florence Project
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

DANIEL PATRICK LUCCA
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April 8, 2022

The Honorable Elizabeth Hanes, Magistrate Judge
United States District Court for the Eastern District of Virginia
701 E Broad St
Richmond, VA 23219

Dear Judge Hanes:

Please accept the following materials as part of my application for a 2022-2023 term law clerk position in your chambers at the United States District Court for the Eastern District of Virginia. I am a third-year student at Boston College Law School, looking for an opportunity to clerk after graduation, and I believe that clerking in your chambers would allow me to get the best start to my career imaginable.

I am confident that I would be able to contribute meaningfully as a law clerk, as the breadth of my experiences before and throughout law school have molded me into someone who would be effective in the position. As an intern for Judge Marianne Bowler at the U.S. District Court for the District of Massachusetts, I gained substantive exposure to the federal judicial system and was able to hone my writing skills through the drafting of judicial opinions. My other experiences while in law school, such as with the U.S. Securities and Exchange Commission or with the U.S. Department of Veterans Affairs in the Office of Inspector General, have also helped me develop my legal research and writing skills to the point where I would be a success in this position. At those positions, I constantly researched and wrote on legal issues that came up at the office I worked in, such as employment law issues or potential securities violations. As a whole, I believe that the combination of these experiences have prepared me well for a potential clerkship in your chambers.

Along with my application please find a copy of my resume, my most recent transcript, a writing sample, and a document containing contact information for two professional references. If you have any questions, please feel free to contact me at the above address and telephone number. Thank you very much for considering my application.

Sincerely,

Daniel Lucca

DANIEL PATRICK LUCCA

1911 Beacon Street, Apt. B, Brookline, MA 02445 • (720) 841-8654 • luccada@bc.edu

EDUCATION

BOSTON COLLEGE LAW SCHOOL — Newton, MA
Candidate for Juris Doctor — May 2022
GPA: 3.58/4.00 (Top 33%)
Activities: Gulf Coast Recovery Trip, Criminal Law Society 2L Representative, Children's Rights Group 2L Representative, Wendell F. Grimes Moot Court

UNIVERSITY OF COLORADO BOULDER — Boulder, CO
Bachelor of Arts, *magna cum laude*, in History — May 2018
GPA: 3.71/4.00
Senior Honors Thesis: "To a Millennial Kingdom: The Nazi Aryanization of Christianity"

EXPERIENCE

BOSTON COLLEGE PROSECUTION CLINIC — Newton, MA
Student Attorney — September 2021-December 2021
- Represented the state during court proceedings under the supervision of an attorney
- Completed legal research & writing projects relating to current criminal proceedings
- Assisted with discovery and trial preparation

U.S. SECURITIES AND EXCHANGE COMMISSION — Washington, D.C.
Honors Program Intern (Remote) — August 2021-November 2021
- Assisted staff in drafting pleadings, chronologies, and memoranda outlining key events and legal issues of ongoing cases
- Researched legal standards and precedent to help support securities-related litigation
- Attended non-public commission meetings discussing SEC recommendations

DEPARTMENT OF VETERANS AFFAIRS, OFFICE OF INSPECTOR GENERAL — Washington, D.C.
Summer Law Clerk — June 2021-August 2021
- Conducted legal research on and prepared memoranda reflecting Merit Systems Protection Board, Equal Employment Opportunity Commission, and Federal Court case law precedent and applied the precedent to pertinent facts of issues arising before the office
- Reviewed, summarized, and conducted legal research on issues regarding qui tam complaints arising before the office

U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS — Boston, MA
Judicial Intern to the Honorable Marianne Bowler — January 2021-April 2021
- Observed court hearings and proceedings
- Assisted with the research and drafting of judicial opinions

COLORADO STATE PUBLIC DEFENDER — Brighton, CO
Intern — May 2020-July 2020
- Conducted interviews with clients awaiting arraignment
- Drafted motions and briefs for cases involving topics such as warrantless searches

COLORADO LEGAL SERVICES — Denver, CO
Legal Assistant — November 2018-June 2019
- Provided intake and resources to clients in the family law and general divisions

COMMUNITY LEADERSHIP ACADEMY — Commerce City, CO
Teaching Assistant — August 2018-May 2019
- Assisted the teachers in general duties, such as grading and instructing the students

INTERESTS

- Skiing, watching and playing soccer, hiking

BOSTON COLLEGE

Office of Student Services
Academic Transcript

Boston College
Office of Student Services
Lyons Hall 103
140 Commonwealth Avenue
Chestnut Hill, MA 02467

NAME : DANIEL P LUCCA
SCHOOL : LAW SCHOOL
DEGREE : CANDIDATE FOR JURIS DOCTOR
GRADUATE DISCIPLINE : LAW

STUDENT ID#: 14397647
DATE PRINTED: 01/30/2022

FALL 2019 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2120	CIVIL PROCEDURE	04	04	B
LAWS2130	CONTRACTS	04	04	B+
LAWS2145	TORTS	04	04	A
LAWS2150	LAW PRACTICE 1	03	03	B+

			ATT	EARN	UNITS
TERM GPA:	3.421	TERM TOTALS:	15	15	15
CUM GPA:	3.421	CUM TOTALS:	15	15	15

SPRING 2020 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2125	CONSTITUTIONAL LAW	04	04	P
LAWS2135	CRIMINAL LAW	04	04	P
LAWS2140	PROPERTY	04	04	P
LAWS2155	LAW PRACTICE II	02	02	P
LAWS8045	IMMIGRATION PRACTICE	03	03	P

			ATT	EARN	UNITS
TERM GPA:	0.0	TERM TOTALS:	17	17	00
CUM GPA:	3.421	CUM TOTALS:	32	32	15

FALL 2020 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS6683	IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS	03	03	B+
LAWS7645	ELECTION LAW	02	02	A-
LAWS7750	CORPORATIONS	03	03	B+
LAWS9943	CRIMINAL PROCEDURE	03	03	B+
LAWS9957	SPORTS LAW	03	03	A-

			ATT	EARN	UNITS
TERM GPA:	3.451	TERM TOTALS:	14	14	14
CUM GPA:	3.436	CUM TOTALS:	46	46	29

SPRING 2021 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS3344	AMERICAN LEGAL EDUCATION	03	03	A-
LAWS7731	ADMINISTRATIVE LAW	03	03	P
LAWS8667	LEGAL PRACTICE EXTERNSHIP	05	05	P
LAWS8834	JUDICIAL PROCESS	01	01	P
LAWS9996	EVIDENCE	03	03	A

			ATT	EARN	UNITS
TERM GPA:	3.835	TERM TOTALS:	15	15	06
CUM GPA:	3.504	CUM TOTALS:	61	61	35

FALL 2021 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS4424	CRIMINAL JUSTICE CLINIC CLASS	02	02	A-
LAWS4469	BC LAW PROSECUTION SEMINAR	02	02	A-
LAWS8250	ADMINISTRATIVE LAW EXTERNSHIP SEMINAR	01	01	P
LAWS8306	BC LAW PROSECUTION CLINIC	06	06	A
LAWS8667	LEGAL PRACTICE EXTERNSHIP	04	04	P

			ATT	EARN	UNITS
TERM GPA:	3.868	TERM TOTALS:	15	15	10
CUM GPA:	3.585	CUM TOTALS:	76	76	45

SPRING 2022 LAW SCHOOL

COURSE	COURSE TITLE	ATT	EARN	GR
LAWS2192	PROFESSIONAL AND MORAL RESPONSIBILITY OF LAWYERS	03	00	IN PROGRESS
LAWS4485	ADVANCED LEGAL WRITING	03	00	IN PROGRESS
LAWS6827	COMPLIANCE AND RISK MANAGEMENT	03	00	IN PROGRESS
LAWS7774	SECURITIES REGULATION	03	00	IN PROGRESS

			ATT	EARN	UNITS
TERM GPA:	0.0	TERM TOTALS:	12	00	00
CUM GPA:	3.585	CUM TOTALS:	88	76	45

TOTAL CREDITS EARNED : 76 CUM GPA : 3.585

END OF RECORD

ISSUED TO : DANIEL P LUCCA
3725 SHADOW CANYON TR
BROOMFIELD
CO
80020

Mary French
Unofficial without signature
Mary French, Registrar

DANIEL PATRICK LUCCA
1911 Beacon Street, Apt. B, Brookline, MA 02445 • (720) 841-8654 • luccada@bc.edu

Legal Writing Sample

The following is a judicial order I drafted for my Advanced Legal Writing Class during the Spring 2022 semester. The order analyses a plaintiff's motion to transfer venue under 28 U.S.C. § 1404, ultimately concluding that the plaintiff had not met their burden to show that transfer was warranted.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

TRENT BUTLER Plaintiff,	))	
v.	)	CASE NO. C-01-106-D
THOMPSON/CENTER ARMS CO. Defendant.	))	

March 5, 2022

ORDER

I. INTRODUCTION

In this case, Trent Butler ("Butler"), the plaintiff, has brought a products liability suit against Thompson/Center Arms Co. ("Thompson"), the defendant, arguing that Thompson is responsible for manufacturing an allegedly faulty rifle that injured Butler. Thompson denies the allegations brought against it. Butler has moved to transfer venue under 28 U.S.C. § 1404 from this court to the Eastern District of Oklahoma. Thompson objects. For reasons below, we deny Butler's motion to transfer.

II. BACKGROUND[1]

This dispute arises from an allegedly faulty rifle and a hunting trip in Oklahoma. On November 2, 1997, Butler went on a hunting trip with his father ("Mr. Butler") and another man, Bo Frank,

[1] No independent factual record exists in this case, and so this background is derived from the parties' allegations set forward in their briefs.

on an area of leased land in Tahlequah, Oklahoma. While on the trip, Butler carried and used a Thompson muzzle-loaded rifle to hunt.

While hunting on the morning of November 2, Butler climbed into a tree stand and sat down. In the tree stand, he placed the hammer of his rifle in a quarter-cock position and positioned the rifle with the butt rested on the floor and the muzzle pointed towards the sky. After doing this, Butler heard a noise and turned around, and as he did, the rifle fell between the floor boards of the tree stand. When the rifle fell, the hammer of the gun struck a board, which fractured some internal components and caused the rifle to fire a bullet. The bullet struck Butler in his right thigh and shattered his femur.

Not knowing what to do, Butler screamed for help. James Flourney ("Flourney") and Jerry Leonard ("Leonard") rushed to assist him. After arriving at the scene, Leonard climbed into the tree stand to administer aid, and Flourney tried to get Mr. Butler's attention by climbing into Mr. Butler's truck and honking the horn. The noise alerted Mr. Butler, who arrived at the scene shortly. Once he arrived at the scene, Flourney informed Mr. Butler about what happened and then went home to tell his own father about what happened. There, Flourney's mother called an ambulance to the hunting area. Flourney and his father quickly returned to the scene. Meanwhile, Mr. Butler helped his son to the ground, and Bo Frank reached the tree stand shortly thereafter.

An ambulance soon arrived and transported Butler to a helicopter, which flew him to a hospital in Tulsa, fifty miles from the hunting ground. At the hospital, Butler underwent surgery, and he was released on November 7, 1997. However, lasting damage persisted in Butler's leg, forcing him to undergo several more surgeries during the subsequent months. The vast majority of these surgeries occurred in Oklahoma.

Butler, now a Florida resident and twenty years old, has brought suit in this court, asserting that his injuries are the result of the allegedly defective rifle he used that day. Butler argues that Thompson, as the manufacturer of the gun, is responsible for his injuries. In addition, Butler contends that Thompson breached implied and express warranties and failed to provide clear warnings.

After bringing suit in this court, Butler has now motioned for a transfer of venue under 28 U.S.C. § 1404 to the Eastern District of Oklahoma, located fifty miles from Tulsa and thirty miles from the hunting site in Tahlequah. Butler asserts that the proposed venue would be a substantially better venue than this court. This court disagrees.

III. ANALYSIS

The main issue at this point of the case revolves around whether this court should grant Butler's motion to transfer to the Eastern District of Oklahoma under 28 U.S.C. § 1404. In pertinent part, the statute states that: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a).

Both Butler and Thompson agree this case "might" have been brought in Oklahoma, but that fact does not necessarily mean that transfer is warranted. Courts may only transfer if the relevant circumstances indicate that the proposed jurisdiction is substantially more convenient than the current forum. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988); *Anderson v. Century Prod. Co.*, 943 F. Supp. 137, 148 (D.N.H. 1996). Courts take several factors into

account when deciding whether to transfer, stemming from the "private" and "public" interests at stake in the case. *See Stewart Org.*, 487 U.S. at 29-31.

Secondly, this case is uncommon in that the plaintiff, rather than the defendant, is motioning for a transfer of venue. However, this difference does not result in any change in analysis. The party motioning for transfer, rather than the plaintiff or defendant, carries the burden of showing that transfer is warranted. *See Coady v. Ashcraft & Gerel*, 223 F.3d 1, 11 (1st Cir. 2000); *S.M.W. Seiko, Inc. v. Howard Concrete Pumping Co.*, 170 F. Supp. 2d 152, 156-57 (D.N.H. 2001). This burden the motioning party carries is a substantial one. *Buckley v. McGraw-Hill, Inc.*, 762 F. Supp. 430, 440 (D.N.H. 1991). In this case, Butler is the party motioning for a transfer of venue, and therefore, Butler carries the substantial burden to show transfer is warranted.

Butler carries the burden of proof, and so he must show the public and private interests at stake predominate in favor of transfer. *See Buckley*, 762 F. Supp. at 439. As a general matter, private interests involve both the convenience of the witnesses and the convenience of the parties in attending the litigation. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). Public interests include several different factors, such as having local cases decided at home, any burdens placed on the local judicial system, and an interest in avoiding an unnecessary conflict of laws. *Gulf Oil Corp.*, 330 U.S. at 508-09 ("There is an appropriateness … in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws.").

A. ANALYSIS OF THE PRIVATE INTERESTS AT STAKE

Butler has not convincingly shown that the private interests favor transfer in this case. First, the convenience of the witnesses does not weigh predominately in favor of transfer. Convenience of the witnesses is the most important factor in considering whether to grant a motion for transfer. *Buckley,* 762 F. Supp. at 440. Here, Butler argues that the key witnesses in this case all reside in Oklahoma, and this court would not be able to ensure these witnesses' live testimony, as they all live outside of this court's subpoena power. Butler argues his witnesses are crucial to this case, as they are best equipped to speak to the operative facts underlying this case, namely Butler's injury and subsequent medical care. In this respect, Butler asserts that this case is analogous to *Packer v. Kaiser Foundational Health Plan*, a medical malpractice case in which the D.C. District Court granted transfer to the Eastern District of Virginia, where the medical malpractice occurred. 728 F. Supp. 8, 9 (D.D.C. 1989). Like *Packer,* Butler argues, the operative facts of this case are in Oklahoma, where the sale of the gun, the injury, and most of the medical treatment occurred. *See* 728 F. Supp. at 9. Therefore, Butler contends, this court should transfer this case to the Eastern District of Oklahoma for his witnesses to provide live testimony.

Butler's argument is not convincing. A preference for live testimony does exist for witness testimony, but this preference only relates to the testimony of *key* witnesses. *See Mohamed v. Mazda Motor Corp.*, 90 F. Supp. 2d 757, 775 (E.D. Tex. 2000); *Anderson*, 943 F. Supp. at 149. In determining who is a key witness, the quality of the testimony offered trumps the quantity of testimony. *See Dealtime.com v. McNulty*, 123 F. Supp. 2d 750, 755 (S.D.N.Y. 2000). Key witnesses would be those who could speak to anything relating to the operative facts of the case. *See id.* at 755-56; *Mohamed*, 90 F. Supp. 2d at 776-77.

In products liability cases like this one, the site of operative facts is where the allegedly defective product was manufactured, not where it may have harmed someone. *See Mohamed*, 90 F. Supp. 2d at 776-77; *Packer*, 728 F. Supp. at 9. Here, Thompson produced the allegedly faulty gun in New Hampshire, and consequently, the key witnesses would be located in New Hampshire. Butler's witnesses would likely not be key witnesses, as they would only be testifying to the damages Butler incurred. Furthermore, Butler has not demonstrated that he would be unable to use his witnesses in this court through alternative means, such as video-recorded testimony. *See Dealtime.com*, 123 F. Supp. 2d at 757. Therefore, the convenience of the witnesses does not weigh substantially in favor of transfer.

Secondly, Butler has not shown the convenience of the parties weighs predominately in favor of transfer. In assessing this factor, courts may account for the relative financial strength of each party to bear the costs of litigation. *Galonis v. Nat'l Broad. Inc.*, 498 F. Supp. 789, 793 (D.N.H. 1980). Butler argues that the costs of litigation for him in this court would be unduly prohibitive, as hauling in his witnesses from Oklahoma would be too expensive for him. Secondly, Butler points out, Thompson would be in a better position to absorb the financial costs of litigation if this case were to be transferred to the Eastern District of Oklahoma.

In this case, the relative financial strength of each party to bear the costs of litigation does not strongly favor transfer. Butler, a resident of Florida, would have to travel to either New Hampshire or Oklahoma to litigate his claims. For Butler, the only monetary difference between both forums is that he would be able to stay with his father in Oklahoma, but he would have to pay for lodging in New Hampshire. This difference would unlikely make a meaningful impact in overall cost to Butler, especially when considering how any potential litigation would likely last less than a week. Thompson would likely be better able to bear the financial costs of traveling to

Oklahoma, which does weigh in Butler's benefit, but not so much to tip the scales substantially in Butler's favor. *See Anderson*, 943 F. Supp. at 148.

Another factor that courts may consider when assessing the conveniences of the parties is the parties' ability to compel key witnesses to attend the litigation. *Id.* at 149. Butler has argued this factor weighs in his favor because his witnesses cannot be compelled to testify in New Hampshire court, but the Eastern District of Oklahoma does have the power to bring in both his and Thompson's witnesses. This argument is not persuasive. Butler has not shown that his witnesses are unwilling or unable to travel to New Hampshire, and even if they were, Butler has alternative means of capturing their testimony, such as through video recording. *See Dealtime.com*, 123 F. Supp. 2d at 757. Additionally, Butler's witnesses are unlikely to be key witnesses, and so their live testimony is not absolutely needed. *See Anderson*, 943 F. Supp. at 149. This factor, like the first, indicates that Butler has not shown that the interests of the parties clearly weigh in favor of venue transfer.

Lastly, in assessing the convenience of the parties, a great deal of deference should normally be accorded to the plaintiff's choice of forum. *See, e.g.*, *Buckley*, 762 F. Supp. at 439. However, Butler argues that because this court is not in his home state, and it is not where the hunting accident occurred, this court should give this choice of forum relatively less deference. His argument is partially true. The deference accorded to a plaintiff's initial choice of forum is diminished when the operative facts of the case occurred outside of that state and when the plaintiff's chosen forum is not their home state. *LG Elec., Inc. v. First Intern. Comput., Inc.*, 138 F. Supp. 2d 574, 589 (D.N.J. 2001); *Ricoh Corp. v. Honeywell, Inc.*, 817 F. Supp. 473, 481 (D.N.J. 1993). In this situation, the locus of operative facts is centered in New Hampshire, but this state is a foreign forum for Butler. Because this forum is foreign for Butler, his initial choice

of forum should be given less deference than usual. However, based on the entirety of this analysis, Butler has failed to show that the private interests at stake predominately favor transfer to Oklahoma.

B. ANALYSIS OF THE PUBLIC INTERESTS AT STAKE

In addition to the private interests at stake, the public interests in this case do not predominately weigh in favor of transfer. As previously mentioned, the public interests include factors such as having localized controversies decided at home, any burdens placed on a local judicial system, and conflict of law issues. *See Gulf Oil Corp.*, 330 U.S. at 508-09. With the first question of having localized controversies being decided at home, Butler argues that his injury occurred in Oklahoma, and so this case is local to and should be decided in Oklahoma. This argument is not necessarily true. As previously noted, the locus of operative facts in this case is in New Hampshire, not Oklahoma. *See Mohamed*, 90 F. Supp. 2d at 776-77. Because the key facts of this case are centered in New Hampshire, this case is not completely local to Oklahoma, and so this factor does not weigh predominately in favor of transfer. Secondly, Butler has failed to show any judicial or administrative advantage by having the case decided in the Eastern District of Oklahoma rather than in New Hampshire. Indeed, Butler's motions state little about potential administrative and judicial burdens in each potential forum state.

Third, Butler is unable to show any conflict of laws would exist or that Oklahoma law should be applied in this case. Butler asserts that if this case were brought in this court, we would have to apply Oklahoma law under New Hampshire's choice-of-law rules. His assertion is incorrect. Under choice-of-law rules, when multiple states have an interest in a suit and the choice involves

substantive law, the court must first decide whether the relevant law actually conflicts with the laws of the other interested states. *SIG Arms Inc. v. Emps. Ins. of Wasau*, 122 F. Supp. 255, 258-59 (D.N.H. 2000). The party asserting that a conflict exists has the burden of showing it *actually does exist*. *Id.* at 259. Butler is the party asserting a conflict of substantive law, but he has not proven that a conflict exists between relevant New Hampshire and Oklahoma law. Based on this analysis, Butler has failed to show the public interests in this case substantially favor transfer.

IV. CONCLUSION

Butler has failed to meet his substantial burden to show that the relevant factors predominately favor transferring this case. Both the public and private interests do not weigh so heavily in favor of transfer that the Eastern District of Oklahoma is a substantially better forum than this court. Based on these points, this court denies Butler's motion to transfer venue.

Applicant Details

First Name	**Gillian**
Last Name	**M. Vernick**
Citizenship Status	**U. S. Citizen**
Email Address	**gv98@drexel.edu**
Address	**Address** Street **1316 New Hampshire Avenue Northwest, #106** City **Washington DC** State/Territory **District of Columbia** Zip **20036** Country **United States**
Contact Phone Number	**4107034246**

Applicant Education

BA/BS From	**University of Maryland-College Park**
Date of BA/BS	**May 2017**
JD/LLB From	**Drexel University Thomas R. Kline School of Law** **https://drexel.edu/law**
Date of JD/LLB	**May 6, 2021**
Class Rank	**20%**
Law Review/Journal	**Yes**
Journal(s)	**Drexel Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Lopez, Rachel
rel62@drexel.edu
(215) 571-4704
Coleman, Clare
ckc32@drexel.edu
Schaeffer, Donna M.
mary.shrader@mdcourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Gillian Vernick
gillian.vernick@drexel.edu (410) 703-4246

August 24, 2020

The Honorable Elizabeth W. Hanes
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,

I am writing to express my interest in a 2021-23 clerkship in your chambers. I am a 3L student at the Drexel University Thomas R. Kline School of Law in Philadelphia, with a strong academic record coupled with diverse real-world experience.

Based on my extensive judicial experience during law school, I believe I would make a strong addition to your chambers. The scope of my work experience from two judicial chambers to a non-profit organization and pro-bono work demonstrates my commitment to protecting civil liberties through litigation and advocacy. My previous positions have given me experience writing bench memorandum, conducting complicated legal research and making judgments concerning issues of first impression. In addition to my work experience, I have honed my writing skills starting in my undergraduate studies of journalism and now through my position on Drexel Law Review.

My resume, unofficial transcript and writing sample are attached for your review. The Kline school will submit my letters of recommendation from Professors Clare Coleman and Rachel Lopez, and the Honorable Donna M. Schaeffer of the Circuit Court of Anne Arundel County, Maryland. In addition, I would offer the Honorable Shirley M. Watts of the Maryland Court of Appeals as an additional reference, contact information available upon request. I would welcome the opportunity to interview with you, and I look forward to hearing from you soon. Thank you for your consideration.

Sincerely,

Gillian Vernick

GILLIAN VERNICK
301 Spring Garden St., Apt. 3A • Philadelphia, PA 19123 • 410-703-4246
gillian.vernick@drexel.edu

EDUCATION

Drexel University Thomas R. Kline School of Law, Philadelphia, PA
Candidate for Juris Doctor, May 2021
GPA: 3.49; Class Rank: 20 (top 15%)

- *Drexel Law Review*, Staff Editor (2019-2021)
- *CALI Best Student Performance in First Amendment*
- *CALI Best Student Performance in Criminal Procedure: Investigations*

University of Maryland, College Park, MD
Philip Merrill College of Journalism, May 2017
GPA: 3.5

- Multi-Platform Media major/Spanish Literature and Culture minor

EXPERIENCE

Electronic Frontier Foundation, San Francisco, CA
Legal Intern, Summer 2020

Legal intern aiding in all aspects of litigation, including legal research and writing, factual investigation and policy research at this leading non-profit organization advocating for civil liberties in the digital sphere, including defending user privacy, free expression and innovation through impact litigation, policy analysis and activism.

Zeichner Risk Analytics, Philadelphia, PA
Legal Intern, Forthcoming Fall 2020

Legal externship working in cybersecurity, risk management and law and policy at this firm advising senior leaders and executives in the public and private sector on innovative approaches to legal cybersecurity challenges.

Homeless Advocacy Project, Philadelphia, PA
Pro-Bono Volunteer, Spring 2020 – present

Volunteer working on securing Social Security Disability Benefits at this legal services organization dedicated to aiding those experiencing homelessness in Philadelphia with vital legal aid, drafted letters of support, aided in research and character interviews for benefits candidates.

The Honorable Shirley M. Watts, Maryland Court of Appeals (Supreme Court of Maryland), Baltimore, MD
Judicial Intern, Summer 2019

Worked as a legal intern, conducting research regarding a wide variety of legal issues and preparing legal memoranda for the highest court in Maryland.

The Honorable Donna M. Schaeffer, Circuit Court for Anne Arundel County, Annapolis, MD
Judicial Intern, Summer 2019

Worked as a legal intern, observing court proceedings and assisting in researching and drafting opinions on a wide range of topics including complex motions memoranda, contractual interpretation and postconviction relief.

BEDA, Madrid, Spain
English Teaching Assistant, Fall 2017- Summer 2018

Taught English as a second language in semi-private school in Madrid, Spain, including preparing lessons, activities and games, administering oral exams, and grading writing assignments for all levels of English.

Gillian Vernick
Drexel University Thomas R. Kline School of Law
Cumulative GPA: 3.49

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Pammela Quinn	A-	4.00	
Contracts	Jennifer Martin	B+	4.00	
Legal Methods 1	Clare Coleman	A-	3.00	
Torts	Barry Furrow	B	4.00	

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law	Donald Tibbs	B	4.00	
Legal Methods II	Clare Coleman	B+	3.00	
Legislation and Regulation	Tabatha Abu El-Haj	B	3.00	
Property	Aimee Kahan	B	4.00	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Alan Garfield	A	4.00	
Evidence	Veronica Finklestein	B+	4.00	
First Amendment	Hannah Bloch-Wehba	A	3.00	
Professional Responsibility	Yolanda Ingram	Pass	3.00	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Copyright	Jaclyn Lesser	A	3.00	
Criminal Procedure	Hannah Bloch-Wehba	A	3.00	
Internet Law	Hannah Bloch-Wehba	A	3.00	
Intl. Human Rights Adv. & Practice	Eric Tars & Rachel Lopez	A-	2.00	
Sales	Amy Boss	B+	3.00	

Grading System Description
4.0 scale

DREXEL UNIVERSITY
Thomas R. Kline
School of Law

Rachel E. Lopez, JD, LLM
Associate Professor of Law

June 15, 2020

Dear Your Honor:

I write in support of Gillian Vernick, a rising third-year law student at Drexel University's Thomas R. Kline School of Law, who is applying to be a law clerk in your Honor's chambers. I was so pleased to hear that Gillian was applying for a clerkship. Prior to becoming an academic, I clerked for the New Mexico Supreme Court and found it to be a transformative experience. I feel confident that Gillian has the necessary skills to be an outstanding clerk and would take full advantage of the opportunity to grow under your tutelage.

I had the pleasure of teaching Gillian in an upper level course focused on international human rights advocacy. The class was aimed at providing students with a solid foundation in international human rights law as well as exposing them to its utility in practice. The class was centered around a simulation of the Universal Periodic Review process before the United Nations Human Rights Council. For the class, students prepare both written submissions and oral presentations on topics of their choice.

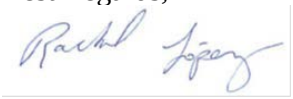
Gillian impressed me on multiple occasions throughout the class. First, she authored a high-quality submission that detailed both the international and U.S. laws on point for her topic, which dealt with the human rights violations resulting from U.S. data collection and surveillance under the PATRIOT Act. Her submission was well-researched, expertly organized, and a pleasure to read.

Second, she skillfully presented her submission to the class, demonstrating her ability to explain very complex and technical legal concepts in a compelling and concise manner. Finally, her contributions to class discussions were always very thoughtful and exact. Her performance on all these assignments earned her one of the top grades in the class.

In addition, her strong interpersonal skills ensure that she will be a collegial co-worker. Specifically, I found Gillian to be a thoughtful listener and very receptive to feedback.

For all these reasons, I believe that Gillian would make a very diligent and talented law clerk. Please do not hesitate to reach out if I can be of further assistance.

Best Regards,



Rachel Lopez, Esq.
Associate Professor of Law

August 24, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am so pleased to write a letter of recommendation on behalf of my wonderful former student Gillian Vernick. Gillian is an excellent writer, a thoughtful scholar, and an energetic and mature student to work with. I recommend her highly.

Gillian was my student for two semesters in Legal Methods (Drexel's legal research, writing, and analysis class). In her first semester, Gillian wrote four memos (two drafts and two finals), and in her second semester, Gillian wrote and argued a brief. In a very competitive class (and on our strict "B" curve), Gillian did very well in Legal Methods, an A- and B+. Gillian's writing is concise and shows a deep understanding of the technicalities of legal research and the fundamentals of good legal writing. Further, her research and writing have been honed this, her second, year with her participation in Law Review.

In person, Gillian is a delight to work with. She was always prepared for class and for the several individual meetings I hold with all students throughout the year. Her questions were perceptive, showing a curiosity and understanding of the law – and a sensitivity to the issues underlying our brief problem in the second semester, which revolved around a protester in the #BlackLivesMatter movement. Gillian is punctual and energetic. Her warmth and commitment to high-quality work will make her an asset in your chambers.

Clare Keefe Coleman
Associate Teaching Professor &
Director of International Programs

Clare Coleman - ckc32@drexel.edu

DONNA M. SCHAEFFER
ASSOCIATE JUDGE
FIFTH JUDICIAL CIRCUIT
CIRCUIT COURT FOR ANNE ARUNDEL COUNTY
ANNAPOLIS MARYLAND 21401

August 3, 2020

RE: Gillian Vernick

Dear Judge:

I enthusiastically recommend Gillian Vernick for employment as a judicial law clerk. Gillian served as a part-time intern in my Chambers in the summer of 2019.

During her internship, Gillian was assigned a variety of research and writing assignments, including researching and preparing bench memoranda on several complex motions and a postconviction matter. Her research was thorough and timely. She seemed to enjoy analyzing and discussing complex legal issues. She worked well with others and required little supervision.

In sum, I was very impressed by Gillian's work ethic and intellect. It was a pleasure getting to know her. I believe she will be an asset to any judge's chambers. Should you have questions or desire additional information, please don't hesitate to contact me.

Very truly yours,

/s/
Donna M. Schaeffer, Judge

DMS:pjs

GILLIAN VERNICK
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Philadelphia, PA 19123 • 410-703-4246
gillian.vernick@drexel.edu

WRITING SAMPLE

This is an opinion that I wrote while interning for the Honorable Donna M. Schaeffer for the Circuit Court of Anne Arundel County, Maryland. The case dealt with issues of property and contract law. The issue was whether the defendant unilaterally modified the terms of an express easement by eliminating the right of ingress across the burdened property.

RIVA, LLC,	*	IN THE
Plaintiff	*	CIRCUIT COURT FOR
v.	*	ANNE ARUNDEL COUNTY
JOE THE GRINDER, RIVA ROAD, LLC,	*	MARYLAND
Defendant	*	CASE No.: C-02-CV-19-000583

* * * * * * * * * * * * * *

OPINION

This matter comes before the court on Plaintiff's Rule 2-501 Motion for Partial Summary Judgment on Count 1 seeking declaratory judgment.

FACTUAL BACKGROUND

The following facts are undisputed. In 2015, Defendant Joe the Grinder, LLC purchased Parcel 12 ("Parcel 12"), a parcel of real property located in the Second Assessment District of Anne Arundel County, Maryland. Anne Arundel County (the "County") required Defendant to establish a use in common access easement over and through Parcel 12 for vehicular traffic between the traffic signal at the intersection of Riva Road and Admiral Cochrane Drive (the "Traffic Signal") and Parcel 17 ("Parcel 17"), then owned by Village, LLC. Defendant and Village, LLC executed and recorded a Declaration of Easement and Agreement ("the Original Easement") on October 8, 2015, which was recorded on November 18, 2015. In Recital B of the Original Easement ("Recital B"), paragraph 1 establishes the easement "as and for a right of way for vehicular ingress and egress on, over, across and through that portion of Parcel 12 described on the attached Exhibit A and depicted on the attached Exhibit B." Recital B, paragraph 2, reserves the Defendant's right to relocate the Easement and the Easement Area to a different area of the parcel as long as the relocated Easement continues to provide "a use in common right of way for

vehicular ingress and egress for the benefit of Parcel 17 over Parcel 12 to the Traffic Signal." Plaintiff, Riva, LLC purchased Parcel 17 in April of 2017. On September 5, 2017, Defendant unilaterally executed and recorded an Amended Declaration of Easement ("the Amended Declaration") that purportedly eliminates Plaintiff's right of ingress to Parcel 17 at the traffic signal. The Amended Declaration omitted the right of ingress that was established in the Original Declaration, restricting the access of Parcel 17 to "access to, over and across Declarant's Property for egress purposes."

On February 22, 2019, Plaintiff filed a Complaint for Declaratory Relief, Breach of Agreement, Damages and Attorney's Fees. Plaintiff seeks a (1) Declaratory Judgment declaring that the Original Declaration is enforceable and the Amended Declaration is unenforceable, (2) damages for breach of contract and (3) costs and attorney's fees. Plaintiff simultaneously filed a Motion for Partial Summary Judgment. Defendant timely filed both its Answer and Opposition.

STANDARD OF REVIEW

To prevail on summary judgment, the moving party must establish that there is no genuine issue of material fact. *Carter v. Aramark Sports & Entm't Servs. Inc.*, 153 Md. App. 210, 224, 835 A.2d 262, 270 (2003). "A material fact is a fact the resolution of which will somehow affect the outcome of the case." *King v. Bankerd*, 303 Md. 98, 111, 492 A.2d 608, 614 (1985) (citing *Lynx, Inc. v. Ordnance Products, Inc.*, 273 Md. 1, 8, 327 A.2d 502, 509 (1974)). When ruling on summary judgment, a court must look at the facts in the view most favorable to the non-moving party. *Sterling v. Johns Hopkins Hosp.*, 145 Md. App. 161, 167, 802 A.2d 440, 443 (2002). While summary judgment is no alternative to trial, *Rite Aid Corp. v. Hagley*, 374 Md. 665, 684, 824 A.2d 107, 118 (2003), it is appropriate when the movant is entitled to judgment as a matter of law. *Sterling,* 145 Md. App. at 167, 802 A.2d at 443 (citing Md. Rule 2-501(a)). If the facts are

susceptible to more than one permissible inference, summary judgment is not appropriate. *Carter,* 153 Md. App. at 225, 835 A.2d at 271 (citing *Porter v. Gen. Boiler Casing Co.*, 284 Md. 402, 413, 396 A.2d 1090, 1096 (1979)).

The party opposing the motion must produce admissible evidence that shows a genuine dispute of material fact exists. *Hagley*, 374 Md. at 684, 824 A.2d at 118 (citing cases). This requires more than "general allegations which do not show facts in detail and with precision." *Id.* Summary judgment will not be defeated by "conclusory statements, conjecture, or speculation" and the opposing party must present disputed facts which are "material and of substantial nature." *Carter*, 153 Md. App. at 225, 835 A.2d at 271 (citing *Opals On Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 370 n.3 (2d Cir. 2003). A trial court has discretion to deny summary judgment even when the technical requirements of the judgment have been met in favor of hearing a case fully on the merits. *Dashiell v. Meeks*, 396 Md. 149, 164, 913 A.2d 10, 16 (2006) (quoting *Metro. Mortgage Fund, Inc. v. Basiliko*, 288 Md. 25, 28, 415 A.2d 582, 583 (1980)).

"Although granting summary judgment in a declaratory judgment action is the exception rather than the rule, circumstances may warrant the entry of a full or partial summary judgment even in such a context." *Messing v. Bank of Am.*, 373 Md. 672, 684, 821 A.2d 22, 28 (citing cases). A court must always declare the rights of the parties in a claim for declaratory judgment even at the summary judgment stage. *Beale v. Am. Nat'l Lawyers Ins. Reciprocal*, 379 Md. 643, 649, 843 A.2d 78, 82 & n.4 (2004) (citing *Megonnell v. United Servs. Ass'n.*, 368 Md. 633, 642, 796 A.2d 758, 763 (2002)).

DISCUSSION

In the case *sub judice*, it is undisputed that Defendant and Plaintiff's predecessor in interest executed the Original Easement.[1] Thus, the issue before the court is one of contractual interpretation regarding an express easement. The interpretation of a contract is a question of law to be determined by the court. *Calomiris v. Wood*, 353 Md. 425, 434, 727 A.2d 358, 362 (1999). The court considers "the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution." *Pacific Indem. Co. v. Interstate Fire & Cas. Co.*, 302 Md. 383, 388, 488 A.2d 486, 488 (1985). With this background, the court examines the contract to determine whether the language is ambiguous. *Id.* Courts generally adhere to the rule that if the contractual language is unambiguous, parol evidence is inadmissible. *Id.* at 389, 488. *See also Jenkins v. Karlton*, 329 Md. 510, 526, 620 A.2d 894, 902 (1993) ("[P]arol evidence was not admissible to inject a condition not apparent on the face of note.") "In determining whether a writing is ambiguous, Maryland has long adhered to the law of the objective interpretation of contracts." *Calomiris*, 353 Md. at 435, 727 A.2d at 363 (citing cases). The objective test is not determined by what the parties to the contract intended, but what a reasonable person in the position of the parties would have thought the contract meant. *Gen. Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261, 492 A.2d 1306, 1310 (1985). A contract is ambiguous when a reasonably prudent person thinks the language in the contract is susceptible to more than one meaning. *Id.* If the contract is determined to be ambiguous, the court can consider extrinsic evidence, but only for purposes of interpreting the contract's ambiguous terms. *Calomiris*, 353 Md. at 447, 727 A.2d at 369. The Court of Appeals has held that a case involving a real property

[1] There are no facts or even allegations to support a finding of fraud or duress.

transaction presents an even stronger reason to bar extrinsic evidence to vary the written terms of the contract. *Id.* at 443-44, 367.

Here, the court finds the terms of the Original Declaration of Easement to be unambiguous. The express easement in the Original Easement clearly grants access for ingress and egress to the dominant estate. The Original Easement establishes an easement for "ingress *and* egress" through Parcel 12 for the benefit of Parcel 17 not once, but twice, in paragraphs 1 and 2 of Recital B. (Emphasis added). Recital B, paragraph 1 grants a "non-exclusive, perpetual easement as and for a right of way for vehicular ingress and egress on, over, and across and through that portion of Parcel 12." Recital B, paragraph 2 states that the Defendant has the right to relocate the easement, so long as the relocated easement continues to provide "a use in common right of way for vehicular ingress and egress for the benefit of Parcel 17 over Parcel 12 to the Traffic Signal." Even viewing the language of the easement in the light most favorable to the Defendant, a reasonable person could not interpret this language in any way other than granting a two-way easement for ingress and egress to the traffic light. The plain meaning of ingress and egress, strictly construed, gives the dominant estate a right of way to enter and leave over Parcel 12. The language "to the Traffic Signal" clearly establishes the length of the easement and is not a restriction on the direction of the traffic. There is no ambiguity.

An easement is a non-possessory interest in the real property of another, creating a dominant and servient tenement. *Miller v. Kirkpatrick,* 377 Md. 335, 349, 833 A.2d 536, 544 (2003). A general rule of an express easement is that "because an easement is a restriction upon the right of the servient property owner, no alteration can be made by the owner of the dominant estate which would increase such restriction except by mutual consent of the parties." *Id.* (quoting *Greenwalt v. McCardell*, 178 Md. 132, 136, 12 A.2d 522, 524 (1940)). The converse would also